

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:) Case No. 07-11337(KG)
) Chapter 11
The SCO GROUP, INC., et al.,)
) Courtroom No. 3
) 824 N. Market Street
) Wilmington, Delaware 19801
Debtors.)
) September 16, 2008
) 10:00 a.m.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

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WITNESSES:

DIRECT

CROSS

REDIRECT

RECROSS

Mr. Darl C. McBride 33(Spe) 65(Lew) 83(Spe)

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1 (The following was heard in open court at 10:00 a.m.)

2 THE CLERK: Please rise.

3 THE COURT: Good afternoon, everyone. Thank you and
4 be seated, please. Ms. Makowski, good morning.

5 MS. MAKOWSKI: Good morning, Your Honor. For the
6 record, Kathleen Makowski from Pachulski, Stang, Ziehl &
7 Jones. Your Honor, we filed an amended notice of agenda.

8 THE COURT: Yes.

9 MS. MAKOWSKI: And -- great, Your Honor has that, I
10 take it?

11 THE COURT: I do, indeed.

12 MS. MAKOWSKI: Your Honor, there are four matters on
13 the agenda for today. If I might take the fourth matter
14 first, that is the quarterly fee applications.

15 THE COURT: Yes.

16 MS. MAKOWSKI: I understand from chambers that Your
17 Honor has no questions about the fee applications?

18 THE COURT: Correct.

19 MS. MAKOWSKI: And, I'm prepared to hand up a form
20 of order if Your Honor would allow me to approach.

21 THE COURT: Please, thank you. Good morning. Thank
22 you. I'm prepared to sign it, thank you.

23 MS. MAKOWSKI: Thank you, Your Honor. I'll turn the
24 podium over to my colleague, Art Spector from the firm of
25 Berger Singerman.

1 THE COURT: Thank you. Mr. Spector, welcome back.

2 MR. SPECTOR: Thank you, Your Honor. I'm here to
3 get -- today with Mr. McBride of the company and Ryan
4 Tibbitts, General Counsel of the company and, also, Fred
5 Norton of Boies, Schiller.

6 THE COURT: Good morning, everyone.

7 MALE VOICES: Good morning, Your Honor.

8 MR. SPECTOR: Your Honor, the first matter on the --
9 I guess, it's the second matter of the uncontested agenda, is
10 the stock option motion.

11 THE COURT: Yes.

12 MR. SPECTOR: As Your Honor may have read in the
13 papers, we have -- the Company has stock plans in -- in effect
14 since 1999, regular employees for the lack of a better term,
15 have been getting their stock options through the case. But
16 in -- in concern for the amendment since nine -- 2005,
17 everything is always suspect when you talk about executives.
18 So, we floated the issue to the U.S. Trustee before we filed
19 this motion and tried to get a blessing in advance, a comfort
20 order from the U.S. Trustee as it were.

21 The U.S. Trustee de -- demurred, took no position.
22 We felt it would be important then to air this out publically.
23 We are pleased to announce that the U.S. Trustee and we have
24 agreed that at least for this go around, this period, the
25 stock options to be awarded to the four executives, subject of

1 the motion, would be considered ordinary course. In the order
2 that we're prepared to hand up, we have deleted any reference
3 to this being a precedent of future applications of that type.

4 If Ms. McNam -- man -- pardon me, Mr. McMahon would
5 like to add anything to the record, I'll defer to him on this.

6 THE COURT: Mr. McMahon, you -- you need not, but if
7 you would to, certainly you're welcome to.

8 MR. McMAHON: Nothing to add, Your Honor.

9 THE COURT: Okay.

10 MR. SPECTOR: Okay.

11 THE COURT: Thank you.

12 MR. SPECTOR: Well, we have an order here. I don't
13 know if you want me to hand this up at the end of --

14 THE COURT: Yes. No, you can hand it up now. That
15 would be fine, Mr. Spector. I -- I reviewed the application.
16 I do agree that this, at least as far as this period is
17 concerned, is in the ordinary course both on horizontal and
18 vertical analysis and I'm prepared to enter the order to give
19 whatever I may.

20 MR. SPECTOR: Thank you. This brings us, I believe,
21 when Your Honor is ready --

22 THE COURT: Yes.

23 MR. SPECTOR: -- to the main event of this morning.
24 And that would be for our third request for an extension of
25 exclusivity and I have to say that one of the faults, of

1 course, is mine by being too optimistic again. When I asked
2 for an extension, I should have asked for a larger extension
3 so I don't have to come back as frequently. Although, that's
4 a pleasure as well.

5 But, here we are. I -- I said, when I asked for the
6 extension through August 11th that we hoped that would be
7 enough, but Judge Kimball did a very thorough job on his July
8 16th ruling, which I emphasize was July 16th, which left us
9 precious little time to -- to get what we had to get done.

10 In addition to that, we -- as the motion and reply
11 all point out, maybe ad nauseam for the Court, the market, the
12 people that we have to do business with, want to see an appeal
13 filed. And you would say, well, why is that important, as
14 Novell has properly raised. Well, it's important because when
15 we said in August of '07 that we're going to appeal this
16 terrible ruling that -- that strikes at the heart of our
17 company and people said we've read it and we understand, why
18 don't you file an appeal?

19 Try to explain that to your customers, to foreign
20 investors possibly, to other people who are on the periphery
21 when they say this terrible ruling that -- that you tell us
22 about, why haven't you appealed? Try to tell them that, well,
23 there's procedural language. Teach them about 54(b) of the
24 Federal Rules of Civil Procedure.

25 And, here we are, now July 16th, we get what we

1 consider, you know for all intents and purposes, a favorable
2 ruling which as Judge Kimball had said back in August, well,
3 when we try the rest of the case, we'll be ready to give you a
4 final judgment then. We've tried the rest of the case and
5 here we are waiting for the final judgment Judge Kimball said,
6 come back, Novell, with the final judgment in ten days, which
7 would have been July 26th, which would have been too early for
8 the August 11th date anyway. But, we would then have been
9 able to tell the Judge, we have now filed the appeal and we
10 think we can have a plan in place 45 days from now. It's a
11 different story.

12 We have to file this motion saying we're ready to
13 file an appeal as soon as we're allowed and we'll need, we're
14 thinking, around 45 days to turn that into a transaction or
15 not, and give you our stand alone plan. The -- we have Mr.
16 McBride here to testify, maybe 15 questions on direct. But,
17 the proffer I would make about that is that a lot of what I've
18 just already stated, for one thing. But that we have a duty,
19 that is the Board of Directors of this company have a duty not
20 only to do "a" deal, but do to a proper deal from the
21 perspective of shareholders and not -- and -- and also stock
22 creditors.

23 The -- the Norris deal that you read about in the
24 first plan would have cost us 85 percent, perhaps, of our
25 equity. And there -- he wasn't just handing over 75 to 100

1 million dollars because he was a nice guy, although I'm sure
2 he is. It was because he was basically taking over the
3 company. With the change that has been wrought since July
4 16th from the positive viewpoint, a better deal can be had.
5 Not only that, Mr. Norris and his friends and partners don't
6 have to come to -- to us with \$100 million to deal with a \$40
7 million bogey, which is the Novell claim of \$30 million plus.
8 Now, the whole deal starts to look differently, doesn't have
9 to take 85 percent of the equity. He doesn't have to put in
10 \$100 million and there's a lot that has to change.

11 However, believe it or not, and I hope you do
12 believe it, the rest of the world doesn't see things the way
13 Novell and even we would have seen in a vacuum, what's the big
14 deal! We'll be getting the appeal soon. They're saying you
15 said that a year ago you'll be getting an appeal and here we
16 are a year later and now we're read the filings in Utah and
17 they're saying, well, not so fast, Judge. You told us to
18 do -- give a final -- give you a final judgment. Not so fast.
19 We have this issue and that issue.

20 One of the issues we have, as Novell has raised, is
21 before we can try the remaining two claims that SCO brought
22 in -- in Utah, we have to try the underlying issues in the
23 arbitration in Europe. Number one, that ain't cheap! Law --
24 you think lawyers here are expensive. You've got a bird's-eye
25 view of it. You should see what they are in Europe and we've

1 got to throw our people on top of that. And I don't believe
2 Boies Schiller is on contingency there when they help out.

3 Second of all, who knows how long an arbitration
4 proceeding will last and what the rules are. What does the
5 market place perceive the rules are? Are there appeals from
6 that? Then you've got to digest that result and come back to
7 Utah and then try the other two issues that -- that SCO had
8 brought against Novell. That could be what, a year, two years
9 more before you get the appeal that you wanted in August of
10 '07. Will there be a SCO two years from now under those
11 circumstances? Well, same kind of questioning we had in
12 August or September of '07 when we filed the case. That's the
13 game plan, run out the clock, that we think is in Novell's
14 best interest, their stockholders' best interests.

15 Our stockholders' best interests is to get thee to
16 the Tenth Circuit as quickly as possible. Start the clock
17 moving. People can judge, all right, appeals take nine
18 months, a year, sometimes 15 months, but they can bracket
19 those problems. People have evaluated the strength of our
20 cases. The people we're doing business with, as you can see,
21 York came in and said, we saw and we're willing to take the
22 risk because we believe. Norris and his investors did the
23 same. With -- with the skepticism that this Court, Novell,
24 IBM and we shared, how can we do a deal with this bogey, this
25 question mark over our heads, people came knocking on our

1 doors and said let's see if we can do a deal around it.

2 But, at the point we're at now, they're saying,
3 let's hold off doing anything until we start the clock
4 rolling. So, that's basically the proffer we would make about
5 what the cause is.

6 Now, if we go to the standards for granting
7 extensions, and I -- I fully understand that each time you
8 come before the Court and the Court -- and Your Honor said so
9 last time anyway, the bar is higher and that's why I'm
10 prepared to put on a record, a strong record, to show why it's
11 appropriate.

12 But let me just run through the factors and I know
13 it's not a -- a -- a test of counting factors, one factor
14 weighs more heavily than the other. But the case law does lay
15 out factors --

16 THE COURT: It does.

17 MR. SPECTOR: -- for the guidance of the Court.

18 One of them is what progress has been made? Now,
19 some Courts say, well, progress in negotiations with
20 creditors. Judge, there -- there are two sets of creditors in
21 this case. There are the creditors who we honestly owe money
22 to and they've been silent. They're willing to take a ride
23 with us through this case. They're getting -- well, we'll
24 talk to that -- the rest of that part in a minute.

25 Then there's the creditors who says they're

1 creditors and we say they're not. There's Novell, who filed
2 the large claim which is now a small claim, relatively
3 speaking, \$3 million to this company is not a small claim.

4 We have IBM who, frankly, Judge, we believe the
5 evidence will show and if we can't do it any other way, we
6 intend to bring on a request, at least, for an estimation. We
7 believe if they have any claims against this -- this estate,
8 it's in the nature of attorney's fees and no more than that.

9 We have Red Hat who -- we have evidence which
10 show -- thought that our moves against them was the best thing
11 that ever happened to them because it -- of the -- any
12 publicity is better than no publicity theory. So, those are
13 the creditors we'll call not really creditors. They're --
14 they're opponents in courtrooms, but they're not truly
15 creditors.

16 And then there's the -- the silent majority. And
17 they've been silent and continue to be silent. And that's
18 really, of course, who we're working for instead of working
19 against as to the other group.

20 So, there's been -- what is the progress being made?
21 Of course, we can't be negotiating with Novell, IBM, Red Hat,
22 we're -- well, we can, but it has to be some reciprocity on
23 that and we think it's foolish to be spending too much time on
24 that. But we do have progress, nonetheless.

25 I'm pleased to announce, as I stated in the reply,

1 that the largest claim against the estate has been largely
2 resolved. We'll be bringing some papers to the Court. It's
3 been drafted and we've got an agreement in principle, but
4 shortly, we'll be getting papers to bring you that will
5 dispose of that claim.

6 And let's not forget the Novell claim. That was not
7 an insignificant claim. And thanks to Your Honor's
8 prescience -- prescience in -- in seeing that maybe trying the
9 case in Utah might be a benefit to the debtor, we now have a
10 much, much smaller claim. I'd say that the two largest claims
11 against the estate have been diminished by the extent of
12 almost \$100 million.

13 THE COURT: Yes.

14 MR. SPECTOR: That's progress, Your Honor. If the
15 marketplace perceives it as progress, because if allowed to
16 testify, you'll -- you'll hear Mr. McBride say people were
17 worried about what do we have, \$140 million of claims against
18 us when we filed a schedule showing three. And that did have
19 a -- an impact.

20 Let's talk about pressure. I don't see how this
21 case can compare to the Lincoln Woods case I referenced the
22 last time, where we're using delay as a pressure tactic
23 against Novell. We're a flea on the back of Novell.
24 They're -- they're not having to wait for -- they're having to
25 wait for the \$3 million that we couldn't give them today

1 anyway. It's hardly pressuring them into taking any action.

2 And then let's talk about the factor called
3 reasonable prospects for rehabilitation or reorganization.
4 Well, you've seen some prospects that you didn't think much
5 about and I don't blame you. They -- they didn't pan out.
6 The York deal, the -- the SNCP deal in its first iteration,
7 we're not going to forward with either one of those. But,
8 what -- what you see is the tip of iceberg. You don't see all
9 the other deals that we didn't get to bring to the Court and
10 the other deals that are out there now just waiting like ships
11 in the harbor waiting to -- to come in to port when the appeal
12 is filed.

13 If he were to testify, Mr. McBride would testify
14 about some different types of deals out there. There are
15 merger prospects. There are loans, strict -- just loans,
16 financial deals. There are -- of course, we have a stand
17 alone deal that we don't want to have to do. We'd rather try
18 to do something better for the shareholders and -- and
19 creditors. But if we have to, after the appeal is filed and
20 the deals don't come to the Court, then we'll have to do that.
21 And the stand alone deal is interesting, if we ever get to
22 file it.

23 What other -- oh, I for -- talked about progress.
24 One other progress we have is on the financial front. When
25 this case was first filed, we were concerned that all the

1 planning and R&D that went into Me Inc., the mobility work,
2 was going to be down the tubes because we wouldn't have a
3 company to launch it. We have suffered through a year of
4 bankruptcy and I say that because nobody wants to be in
5 bankruptcy. And -- and notwithstanding that, we have come to
6 market. It's not an R&D company anymore. We have product on
7 the market that's selling well and soon will be selling in
8 other venues. I'm not sure I'm -- I'm free to testi -- to --
9 to -- to speak about it. Mr. McBride is prepared to testify
10 about it if he's free to disclose those future products that
11 are coming out shortly. But, mobility platform is succeeding.

12 UNIX is still plotting along like you would expect.
13 It is a dying -- it's a trailing revenue produce. We knew
14 that going in. But, you know, it has a very long tail. It's
15 very hard to turn this battleship if you use UNIX on your --
16 on your computers that run other applications. It's not like
17 changing applications from Word to Word Perfect or vice versa.
18 It's -- it's much more difficult to do. So, there's always
19 going to be a revenue stream.

20 What the -- what the July 16th ruling did, however,
21 is made that revenue stream -- stream much more likely. And
22 that's because it took away a lot of the clouds that existed
23 in the August '07 ruling and the press, some of which press is
24 not entirely neutral, put out there rumors about the -- who
25 owned the sources of revenue of the company as I outlined in

1 my reply. That -- the ruling in July clarified a lot of that
2 which makes it more likely that we will get somebody to sit
3 down at the table with us.

4 We have the issues of complexity. Your Honor, this
5 is not a -- a -- let's call it A.H. Robbins. This is not
6 Manville. This is not even Dow Corning. This is SCO, with
7 its unique set of problems and the word unique, I think, comes
8 from Your Honor in one of, I think, in the Release from Stay
9 Motion -- Opinion. It's complex in a different sort of way.
10 And I won't harp too much on that factor, but I think the
11 Court can find that factor and I think it has in previous
12 hearings.

13 Paying debts as they come due: Yes, the debtor is
14 paying debts when they -- as they come due. The length of
15 time, I think that's neither a positive or a negative. I can
16 no longer say we've only been here a few months. We've been
17 here a year, almost to the day. But we can't be here a whole
18 lot longer.

19 One of the things that the Congress did in 2005 was
20 gave us a drop dead date.

21 THE COURT: Yes.

22 MR. SPECTOR: The -- the -- the whole idea about the
23 length of your stay was to -- was to deal with cases that
24 languished in Chapter 11 for four years and longer. And, so,
25 if -- if you look before 2005, and you came to a Court and

1 said, Judge, we've only been here 11 and three-quarter months,
2 the Courts might say, well, that wasn't so long. On the other
3 hand, today, when the maximum is 18 months, you can say,
4 you're getting -- getting along. And, so, I don't think that
5 factor cuts either way.

6 Unresolved contingencies: I have one word for that,
7 obviously. So, I think if you go through the factors and --
8 and that's what the case law says, I think we can satisfy
9 those factors. I think we also have to look at the one and
10 only objection that was filed and from ones it came. As I
11 said, the silent majority of -- of creditors remains silent.
12 Novell is a peculiar sort of creditor. It does not have a
13 judge -- well, it doesn't have a judgment. It would if it
14 ever handed it up. But it has the right to a judgment of
15 about three and a half million dollars. There --

16 THE COURT: Inclusive of interest, is that correct?

17 MR. SPECTOR: That's inc --

18 THE COURT: No.

19 MR. SPECTOR: -- no, it's two and a half million, --

20 THE COURT: Plus.

21 MR. SPECTOR: -- plus interest and --

22 THE COURT: Yes.

23 MR. SPECTOR: -- and the interest rate, in order for
24 purposes of finality, SCO swallowed hard, held its nose and
25 said, okay, we'll go with your calculations. Just let us get

1 this done.

2 THE COURT: Yes.

3 MR. SPECTOR: In addition to that, this is a
4 creditor who we dis -- in one -- in one side of its mouth
5 says, deny exclusivity extension and the other side is doing
6 everything it can -- can to prevent us from getting our appeal
7 filed and getting this resolved. I know they're going to
8 point to us having inconsistencies. That's part of
9 litigation. But I think the strategic inconsistency is the
10 more telling. All they have to do is have handed up a
11 judgment in the ten days that the Judge allowed. We're ready
12 to cave wherever we could and, as you can see, yesterday, our
13 compatriots at Boies, Schiller, on behalf of our client, SCO,
14 filed a document with the Utah Court -- Court saying, okay, if
15 it's a problem with those other two causes of action, drop
16 them. If it's a problem about constructive trust, we've got
17 the number already canned.

18 THE COURT: Yes.

19 MR. SPECTOR: Okay. Judge, it's final. Now, maybe
20 Judge Kimball will see it our way in -- in a week or so or
21 however long we've got -- we'll have that final judgment and
22 we should have an appeal the next day, in which case we're not
23 talking about that long of a delay from now. And maybe I'm
24 doing it again. Maybe I'm asking for too short. Maybe 45
25 days is unreasonably short. But, I'm hopeful that the --

1 the -- the deal people, once the appeal is filed, will lose
2 their last final objection to -- to sitting down and doing the
3 deal. Other the other clouds have substantially dissipated
4 about the future of the UNIX business and -- and the revenues
5 sources that the stand alone company would have if they took
6 it over, or they joined.

7 The one thing they keep harping on, as the evidence
8 will show, is when do you start that clock? Will you be able
9 to run out -- or -- or they will be able to run out the clock
10 before you get into an appeal.

11 So, Your Honor, we think that -- we've -- we've met
12 all the standards and cause exists for this one for the time.
13 I won't say last, because Your Honor was right when you said
14 it the last time. Don't use that term unless you can't avoid
15 it. I will ask for this one further extension today and,
16 hopefully, that will be all we need. And if we're wrong, we
17 do have a hard deadline coming up anyway.

18 THE COURT: Yes.

19 MR. SPECTOR: So, something's going to happen and I
20 think it's March 14th.

21 THE COURT: Yes.

22 MR. SPECTOR: Thank you, Your Honor.

23 THE COURT: March. I know it's March. Did you --

24 MR. SPECTOR: I -- I'm prepared to call the --

25 THE COURT: I don't if Mr. Lewis wants to make an

1 argument first, if you'd like to hear the evidence, Mr. Lewis?

2 MR. LEWIS: Your Honor, what I'd like to do is make
3 a brief argument and then if Mr. Spector want's to put on his
4 evidence, have a chance to, of course, cross-examine him, then
5 make a final argument, if that's con --

6 THE COURT: That's acceptable, Mr. Lewis, certainly.

7 MR. LEWIS: Thank you, Your Honor. I appreciate it.

8 THE COURT: Welcome back to you.

9 MR. LEWIS: Thank you, Your Honor. First, Your
10 Honor, let's remember what's at stake here. The debtor argues
11 this case as though we're -- we were arguing over the death
12 nail of the case. We're not. We're not. We're only arguing
13 over exclusivity. If exclusivity terminates, this debtor is
14 still in a position to file a plan any time it wants to. It
15 just means others can a plan too. That's all we're talking
16 about. We're not talking about conversion to a Chapter 7.
17 We're not talking about conversion to a Chapter 11. We're not
18 talking about a motion to appoint a Chapter 11 Trustee. We're
19 just talking about exclusivity. And the question is why after
20 all of these months the debtor needs to hold on to
21 exclusivity?

22 Now, I've not had a chance to study the reply very
23 much because it was only filed yesterday and I was in the air
24 when it was filed. And I haven't had certainly a chance to
25 confer with my litigators about some of its contents. But,

1 I -- I think I can respond on kind of a general level to most
2 of the arguments we've heard today.

3 First of all, if the Court looks back at the history
4 of this motion and the other motions in this case, you keep
5 hearing different things. We -- we need to have -- we need to
6 know what's going to happen in the litigation. They now know
7 what's happened in the litigation. The only thing they don't
8 know about is the arbitration which would have decided certain
9 issues in the litigation, which the debtor is responsible for
10 not being decided yet because it invoked the stay and has
11 not -- and we didn't hear it again today, has not agreed to
12 have the stay lifted so that that could have been decided and
13 now proposes to dismiss the action in Utah as to those claims.

14 But what's going to happen to those claims? We
15 don't hear the debtor proposing to dismiss those claims with
16 prejudice. So, what that -- what that means is, these claims
17 are still going to be hanging out there! They're not going to
18 be decided. It's still going to be a cloud over everybody's
19 head, if that's important.

20 And, so, the notion that somehow the arbitrations
21 issues are the tail wagging the dog just makes no sense. And,
22 furthermore, to the extent that it is, it's the debtor's own
23 fault and I don't think this Court can lose sight of that.
24 You have to take responsibility for what you do. This is a
25 court of equity. And what the debtor did was it wanted to try

1 only the case in Utah. It didn't want to deal with the case
2 in -- in -- in the arbitration. And now it's stuck with the
3 consequences and it wants the Court to believe that it's
4 somehow our fault that those consequences which we have talked
5 about right from the start and everybody knew would be the
6 consequences right from the start, are somehow our fault from
7 which it should be relieved under the schemings of a -- an
8 evil creditor or non-creditor if you believe the debtor. That
9 just doesn't square with the facts, Your Honor.

10 And the notion that somehow that's going to be
11 terribly expensive is -- also doesn't square with the facts.
12 As the prior pleadings with respect to that arbitration
13 indicated, that's ready to go. All of the briefing is in.
14 They just have to have a week long trial in arbitration. It's
15 going to have to happen some day. It should have happened
16 when it was ready to go last Fall. Then we wouldn't be here
17 today probably. Or we might be, because that leads to rest of
18 the debtor's argument.

19 The debtor is all over the map on its reasons: need
20 to know what's going to happen in litigation, need to know
21 when the appeal is going to start, the market's changed, we're
22 very successful with our new product, but we still need to
23 protect UNIX even though it's not important anymore and so
24 everybody wants to know when the appeal is going to start for
25 their least important part. If we believe the debtor this

1 morning, the least important part of our business seems to be
2 the one that's carrying the motion, the UNIX business. That
3 makes no sense either. It's not consistent.

4 We hear about all these deals that are supposedly
5 out there just waiting to happen. Now, as an aside, before
6 the debtor puts on any -- any witnesses, I want to just
7 preview what I think is going to be my objection to what --
8 some of the testimony I believe we're going to hear which is
9 it's hearsay. We don't have any of these -- as far as I know,
10 we don't have any of these parties who are supposedly just
11 waiting to enter the gates here to testify about what's really
12 on their minds. We only have Mr. McBride here to testify
13 about what he -- what he says they say. And that's not
14 admissible evidence. That's hearsay.

15 It's not even admissible for the state of mind of
16 the debtor because the state of the mind of the debtor is
17 irrelevant to this motion in terms of whether there's weight,
18 reason, whether they're really is cause to extend the deadline
19 to file and confirm a plan. So, I'm suggesting whatever other
20 testimony Mr. McBride may be about to give, that testimony, if
21 I understand what it's going to be correctly, is simply not
22 admissible testimony.

23 Now, what I think you're hearing, Your Honor, if you
24 listen carefully to what the debtor says about the deals that
25 are out there and Steven Norris Capital Partners and so on and

1 so forth is that there really is no deal out there and there
2 never was. The problem with the Steven Norris deal before was
3 not the percentage that it was going to take, that Steven
4 Norris was going to take. Because if you read that plan, as I
5 recall it, the percentage it was going to take was going to
6 depend on how much money it had to advance. And if the claim
7 is smaller, it's a smaller percentage. So, that wasn't the
8 problem.

9 Our main objections to that plan, Your Honor, were,
10 one, there was a -- an impairment -- an impaired class not
11 allowed to vote issue, which the debtor acknowledged in court.
12 And, secondly, there was no information about Steven Norris
13 Capital Partners and its financial resources. There was no
14 assurance that that plan would ever actually happen, because
15 we didn't know whether Steven -- what -- what the conditions
16 were on the money that Steven Norris was supposed to advance
17 nor did we know the conditions on Steven Norris's ability to
18 get that money as well. That's why it disappeared.

19 The York deal also disappeared for those kinds of
20 reasons, not because -- not because there was some kind of
21 unfairness to equity in their plan, in their deal. There were
22 other questions about what was proposed to transfer to them,
23 who owned what. But that wasn't part of the Steven Norris
24 deal though.

25 So, here we have all this talk about all these

1 people who just can't wait to get in the door. And then we're
2 told but what they really want to know is when the appeal
3 starts. And putting aside the question of whether this is
4 admissible evidence that Mr. McBride is going to propose to
5 give on this issue, it just makes no sense. Because whenever
6 the appeal starts, we don't know how long that's going to
7 take.

8 Sophisticated -- sophisticated clients, and I'm sure
9 these are sophisticated parties, are going to know that.
10 And that's just the appeal at the -- at the Eighth Circuit or
11 the -- the -- and we don't even know what that appeal's going
12 to be about yet because they're going to file their notice of
13 appeal and their statement of the issues and their designation
14 of the record.

15 And I don't know what we're going to do, whether
16 we're going to do a counter-statement of the issues, a pros
17 appeal. I have no idea. Neither does anybody else for that
18 matter when the appeal is filed and there's a final judgment.
19 In fact, we're not even talking about when the appeal starts.
20 We're just talking about when there's a final judgment.

21 And, then furthermore, however long it takes to get
22 through the Eighth Circuit, there's likely they'll be an
23 appeal in Supreme Court if it's important enough. Certainly
24 the debtor has indicated in the past that this is a do or die
25 issue for the debtor. Although we now hear that this is just,

1 I must say inconsistently, the tail wagging the dog part of
2 their business!

3 And, if you go to the Supreme Court, first, they
4 have to grant Cert. They may or they may not. And if they
5 grant Cert, how long does that take to get decided? Who
6 knows! So, the idea that a sophisticated or an -- anybody who
7 knows anything about legal proceedings would somehow consider
8 just the starting date for an appeal to be kind of watershed
9 information that makes them want to rush forward with their
10 deals just doesn't ring true. And, as I say, I think, there
11 are real questions about whether there's any admissible
12 evidence to be offered this morning on that.

13 And then I think you heard the debtor even
14 equivocating our math, saying, well, you know, I'm hoping that
15 all these people who just can't wait to rush through the door
16 will in fact rush through the door in the 45 days after an
17 appeal, after there's a final judgment. But, you know, I
18 might have to come back here and ask for some more time up to
19 our outside deadline.

20 If you look at -- so, if you look at the entire
21 record in this case, Your Honor, I think the real problem here
22 is the debtor really has no deals, never had any deals for
23 that matter probably. We had our doubts about the Steven
24 Norris deal and -- and, apparently, Steven Norris didn't want
25 to go public as it were with real information. You -- the

1 Court may recall that part of the Steven Norris deal was a
2 little up-front money for just being willing to be a plan
3 sponsor. That disappeared and that may have been their real
4 motive. And, so, I think you -- there just -- what we have is
5 a debtor that really has nothing to offer or, if it does,
6 could do it today.

7 And all this other stuff, I mean, this is -- this
8 bankruptcy case is no different than most bankruptcy cases.
9 There are a lot of uncertainties. But bankruptcy is not
10 designed to allow a debtor time to get the best possible deal
11 that might ever be under the possible circumstances.
12 Certainly exclusivity is not designed to do that.

13 And, so, let me now turn to the exclusivity issues,
14 where the -- where the debtor says, well, the real creditors
15 are silent then the unreal creditors are not. Well, I've got
16 news for the -- for the debtor. We are a real creditor.
17 We're owed a lot of money. And while the debtor would like
18 you to believe that it has agreed on the interest rate and so
19 on and it has agreed on -- on the trust fund amount, only
20 by -- because it's basically throwing in the towel to move
21 things along, from what I know of the negotiations, those were
22 real negotiations. There was back and forth.

23 The debtor may have decided it didn't want to argue
24 over some things for its own objectives and that's fine. But
25 that's not because we forced them to. It's because that's

1 what they want to do. And it wasn't simply a cave-in as they
2 almost want the Court to believe that they've simply
3 sacrificed their current interest for the future by agreeing
4 to nearly anything we asked for. That's just not an accurate
5 statement of how the negotiations went.

6 So, who are the real creditors? We're a real
7 creditor. IBM is a real creditor. Everybody's a real
8 creditor in the case. The Code in Section 11:21, and Congress
9 had not distinguished between real creditors and not real
10 creditors in deciding whether to grant exclusivity. We're all
11 real creditors. We're all entitled to this case moving along.

12 And as for the reasons for the silent majority, I
13 think it's pretty obvious that -- that they're letting other
14 people carry the ball for them, maybe my client. We're
15 hearing more ifs, ands or buts and we heard the debtor talk
16 today about how it wants to estimate IBM's claim and Red Hat's
17 claim. We're going to hear the debtor, I almost promise you,
18 coming into this court saying, well, Your Honor, we're all
19 ready to go with the plan now. We have all these people just
20 waiting at the gate. But we really need to estimate IBM's
21 claim and Red Hat's claim before we do that. How many more
22 months is that going to take? Well, we're now really pretty
23 close to the end of the 18 to 20 months Congress has provided
24 for.

25 The only thing consistent about the debtor's

1 position is that it is consistently evasive about what's
2 really going on. I submit, Your Honor, that terminating the
3 exclusivity today and the debtor has now actually had, in
4 effect, an extra month from August 11th, because that's the
5 way the Courts decide the import of the filing of a motion to
6 extend.

7 THE COURT: Correct.

8 MR. LEWIS: Has had an extra month. And it's --
9 and -- and if -- and if exclusivity terminates, the world
10 isn't going to come to an end. What's the debtor afraid of?
11 There just may be other parties and -- and if there aren't any
12 other parties, the debtor isn't harmed and if there are, maybe
13 the debtor isn't harmed either, if you think of the debtor as
14 not only a debtor in its management and maybe its ma -- major
15 shareholders, but you think of the debtor as all of its
16 creditors and all of its constituents. Maybe someone will
17 come up with a better plan that people like better sooner.
18 And if someone comes up with such a plan, then maybe the
19 debtor will come up with a plan even though it says it really
20 shouldn't have to do that right now.

21 That's all we're asking this Court to do. We're
22 just asking the Court to allow terminate the exclusivity which
23 is now over a year old to expire to let the chips fall where
24 they may. The debtor will still be in Chapter 11 and maybe at
25 some point if the debtor still is temporizing, someone will

1 either file a plan or move to convert or move for a Chapter 11
2 Trustee or something or move to dismiss, but that's all for
3 another day. Someone could do that with or without
4 exclusivity.

5 THE COURT: That's right.

6 MR. LEWIS: So, the question to ask the -- the Court
7 maybe should ask itself first and foremost is, why not? Why
8 does the debtor need this endless protection? And I submit,
9 Your Honor, that the debtor wants this endless protection
10 because it really has nothing there to propose at the moment.
11 And if it does, it could do so now. It could do another
12 Steven Norris deal if that was a real deal without giving up
13 needless equity because the claims are so much smaller if the
14 plan could duly provide for the claims in that fashion.

15 And let's find out what can happen. And if the
16 debtor proposes -- if the Court terminates exclusivity and the
17 debtor proposes a plan and that plan is defective in some way,
18 maybe it can be fixed up, maybe even fixed up by negotiations
19 with, horror of horrors, Novell or IBM or some other not real
20 creditor whom the debtor wants this Court to ignore as though
21 they didn't really count.

22 We do really count. We may or may not be the
23 largest creditor, we're a large creditor and we will continue
24 to be a large creditor until some judicial authority somewhere
25 decides differently somewhere down the road months, maybe

1 years. Thank you, Your Honor.

2 THE COURT: Thank you. Thank you, Mr. Lewis. The
3 Court certainly recognizes Novell's status as a cr -- as -- as
4 a real creditor of -- of this debtor. I understand that
5 the -- the debtor has issues with Novell as a creditor, but
6 certainly it is a creditor and that -- that is not an -- an
7 issue certainly for the Court to take seriously.

8 Mr. Spector, would you like to put on -- oh,
9 pardon -- I'm sorry, Mr. McMahon.

10 MR. McMAHON: Your Honor, I'd just like to reserve
11 the -- the right to be heard at the close of the evidence.

12 THE COURT: Absolutely, and the right to cross-
13 examine for that matter, if -- if you deem it appropriate.

14 MR. McMAHON: Thank you.

15 MR. SPECTOR: I -- I neglected to say, and I will
16 get to the evidence in the minute, that I do have drafts of
17 claims objections, Omnibus claims objections, which we were
18 hoping to file. I was hoping to have them done before I got
19 here, but sometime this week, the stockholders have filed as
20 creditors and other various Omnibus types of objections to
21 clean up those matters in advance. And --

22 THE COURT: Certainly.

23 MS. MAKOWSKI: -- we're moving along those lines
24 with this batch.

25 THE COURT: Thank you. Thank you, Mr. Spector.

1 That's clearly evidence or a suggestion of more progress --

2 MS. MAKOWSKI: Thank you.

3 THE COURT: -- they need.

4 MS. MAKOWSKI: I -- I'll call Darl McBride to the
5 stand, Your Honor.

6 THE COURT: Thank you. Mr. McBride, please step
7 forward, sir. Thank you. And you -- if you will just stand
8 in the box and we'll have you sworn in and then you may
9 testify.

10 THE CLERK: Please raise your right hand and place
11 your left hand on the Bible.

12 DARL McBRIDE, DEBTOR'S WITNESS, SWORN

13 WITNESS: Yes.

14 THE CLERK: Please state your full name for the
15 record and spell it?

16 MR. McBRIDE: Darl Charles McBride, D-A-R-L
17 C-H-A-R-L-E-S M-C-B-R-I-D-E.

18 THE COURT: Thank you. Thank you, Mr. McBride. You
19 may be seated. Now, Mr. Spector, I am going to be quite
20 sensitive to the -- the concern that Mr. Lewis previewed about
21 hearsay. So, --

22 MR. SPECTOR: I -- I'm prepared with that, Your
23 Honor.

24 THE COURT: Okay.

25 MR. SPECTOR: I -- it wasn't a frivolous argument he

1 made and I --

2 THE COURT: Certainly.

3 MR. SPECTOR: -- came -- came prepared with some
4 case law.

5 THE COURT: Okay.

6 DIRECT EXAMINATION

7 BY MR. ARTHUR SPECTOR:

8 Q Witness, would you please tell the Court what your
9 present position is?

10 A Yes. Chief Executive Officer of the SCO Group.

11 Q And how did you come to the SCO Group? What is, quickly,
12 your professional background before you got to SCO?

13 A Right. I worked in the computer industry for 20 some odd
14 years, working at Novell for eight or so years, went and did a
15 few start-ups, got recruited to come and be the President/CEO
16 of SCO in 2002, which post I've held since June of 2002.

17 Q What were the companies you worked for prior to coming to
18 SCO?

19 A FranklinCovey Company, Solution Bank, IKON Office
20 Solutions and Novell, primarily.

21 Q Were these all management positions?

22 A Yes.

23 Q Please explain to the Court the business of SCO?

24 A The business of SCO is a systems software company. We
25 own right, title and interest in the UNIX operating system,

1 which we have in turn licensed out to many large companies,
2 such as IBM, Sun Microsystems, Hewlett-Packard, Microsoft, et
3 cetera. UNIX is the -- the core of the company.

4 We have a new initiative that's been under way for the
5 last few years which is taking server software and deploying
6 it towards mobile phone applications. That's a fledgling
7 business, just getting off the ground as we speak. And we
8 have a -- a third business unit now which is designed to
9 recover what we think are significant lost damages of our main
10 business, our UNIX business, over the last several years.
11 That's a company, or a division referred to as SCO Source.

12 Q Would you explain to Judge Gross what Unix Ware is?

13 A Sure. Unix Ware is the UNIX operating system made
14 available for many large customers. It is also the core of
15 the Unisys System V operating system that has in fact been
16 licensed out to many of these large companies.

17 Unix Ware is distinguished in terms of its reliability,
18 its stability, its -- in the computer world, they -- they talk
19 about ruggedized laptops. You can throw it off a building and
20 it won't break. Ours would be the ruggedized operating
21 system. Unlike some operating systems that you may have on
22 your desktop that tend to crash a lot, our systems don't
23 crash. They go on and on and on. We've got servers that have
24 run for 10 and 20 years without ever going down. And, so,
25 implementations like the military, Mission Critical Operations

1 in commerce situations, our systems end up being very popular.

2 Q What is SCO Source? You've already mentioned that name.

3 A SCO Source was an initiative that was started in 2003, I
4 believe it was, to try and recover revenue that was lost as a
5 result of Intellectual Property violations. The company used
6 to be the -- the SCO operation used to generate nearly a
7 quarter of a billion dollars in revenue. When I was brought
8 in 2002, the revenue had fallen down to, it was 50 million and
9 fallen down to 30 some odd million. It's now down a little
10 bit below 20.

11 When I was brought on, the company was within two
12 quarters of going out of business. And one of the main
13 problems as we got into it was the fact that we found that our
14 Intellectual Property has found its way into a competing
15 operating system called Linux, which is given away for free by
16 large companies like IBM and Novell.

17 So, we turned around and filed claims and have been
18 pursuing our rights through the judicial system on that front
19 to try and recover what we think are billions of dollars in
20 damages.

21 Q Can you explain -- you already stated that the mobility
22 end of the business is sort of like a separate part of the
23 business?

24 A Yes.

25 Q Has that made any progress in the years since the

1 bankruptcy was begun?

2 A Yes, we've made significant progress. Even as we speak,
3 we had a -- a product that was launched in the last month by
4 the FranklinCovey Company, an organization I used to work at,
5 Stephen Covey's company on time management and productivity
6 management, if you will. We did a deal with them, licensing
7 deal.

8 They have since gone to market and, kind of like a proud
9 papa, I pack this around in my briefcase, but Franklin Covey's
10 big catalog that hit millions of users just last week came out
11 and they have a full two-page spread in there that goes
12 through one of our flagship mobile products which is called
13 FCmobilelife. We let them license our MeMobile software.
14 They are now going to market with it. And as this came out,
15 we're getting 100s of downloads a day of new -- new customers
16 signing up for this product.

17 With billions of cell phones out there, everybody who has
18 a cell phone that has any intelligence on there, which is a lot
19 of them now, would be a candidate to use this product and get
20 value out of it. So, it's -- we're -- we're very pleased that
21 we're starting to get some traction on that part of the
22 business.

23 Q You have to wait. I'm offering -- I'm -- I'm having the
24 document marked as an exhibit.

25 A Okay.

1 (Pause)

2 MR. SPECTOR: I believe that's maybe the only
3 exhibit we have.

4 THE COURT: Okay.

5 MR. SPECTOR: We might have one other.

6 THE COURT: Okay. So, we can call that DX-1. Any
7 objection to its introduction, Mr. Lewis.

8 MR. LEWIS: I just -- before I answer that question,
9 I just want to be clear what it's being introduced for.

10 THE COURT: That's fine.

11 MR. SPECTOR: It's just supportive of his testimony.

12 THE COURT: Supportive of the new product?

13 MR. SPECTOR: Yes.

14 THE COURT: That it's being marketed?

15 MR. SPECTOR: Yes, sir.

16 MR. LEWIS: That -- that I don't object to, Your
17 Honor.

18 THE COURT: Okay. Thank you, Mr. Lewis. It's so
19 admitted then.

20 MR. SPECTOR: I'll wait for the reporter. Thank
21 you. For the record, the Court has admitted DX-1.

22 MR. LEWIS: Very good.

23 BY MR. SPECTOR:

24 Q August 2007, SCO suffered a -- a setback in the courtroom
25 in District Court in Utah. Would you explain to the Court the

1 impact on SCO's business of that ruling?

2 A Yeah, I would describe it as more of a devastation than a
3 setback. Setback would sound like a storm. What we faced was
4 more like a Grade Four or Grade Five hurricane, to use some
5 common lingo that's out there. It was -- it was very -- very
6 devastating for our business, very devastating to the
7 employees, to customers, to investors and anybody who is a
8 stakeholder of SCO. The ruling came down on August 10th.

9 Q Now, what did it do to your business plans, particularly
10 with the mobility platform that you had invested time and
11 money in?

12 A Well, all parts of the business came under strain. We
13 have had to scale back our operations, our R&D. We've had
14 people that -- employees that have left. We've had customers
15 that have basically come in and have been very concerned about
16 the viability of the company going forward.

17 Q Well, if the company didn't -- would -- well, I won't --
18 won't lead. What did -- in addition to what -- everything
19 else you said, didn't -- well, the -- the opinion had
20 something to say about a constructive trust. What did the --
21 what did SCO perceive would occur if the Utah District Court
22 imposed a constructive trust of any substantial amount?

23 A The -- it would have been our turn-out-the-lights
24 situation on the company. We had a claim by our opponents
25 here that was approaching \$40 million and we had less than \$10

1 million of cash. The quick match would tell you that if they
2 seized all of that cash, you know, as an entity, we would
3 cease to operate.

4 Q Well, could you appeal then?

5 A Well, that was what we've been trying to do for a long
6 time was to appeal and we keep running into roadblock after
7 roadblock. Not being an expert in the legal system, I have to
8 say it was very frustrating to --

9 Q All right. After --

10 A -- go through that.

11 Q -- the August, 2007 ruling, and maybe even before, what
12 role -- and since then, what role have you played in
13 negotiations with potential transaction partners for SCO?

14 A I've been involved in all of the discussions with all of
15 the potential partners, starting with potential partners that
16 happened even on the eve of filing bankruptcy, continuing to
17 the York situation and then on to SNCP and other things that
18 we've looked at long the way.

19 Q All right. So, without going into names, about how many
20 different deals or deal part -- potential partners have you
21 interfaced with since about the August 2007 ruling until now,
22 about 13 months?

23 A It's been more than a handful, maybe -- maybe a couple of
24 handfuls. There's -- there's been a number of discussions
25 with various organizations, probably four or five of those

1 that raise to the level of, you know, serious, you know, let's
2 try and get something done.

3 Q Did the -- did the questions that the August 2007 ruling
4 create prevent people from coming and seeking out SCO for
5 deals?

6 A It was interesting because we had people reaching out to
7 us to do deals and then, typically under a more powerful
8 microscope, is when a lot of them started to go back south.

9 Q When did York first contact you?

10 A York contacted me -- I got a call from one of their
11 managing directors. I think it was the Thursday after the
12 Monday we filed here.

13 Q Okay.

14 A They -- they called me out of the blue.

15 Q In light of the uncertainty surrounding SCO's
16 Intellectual Property rights, why did SCO even consider offers
17 of transactions?

18 A Why did we consider offers of transactions?

19 Q Yes.

20 Q Yeah, well, we -- we had some real concerns about the --
21 the viability of our business, the claims that were being
22 raised against us and we had people coming in saying they
23 wanted to help us resolve these, so we were open to that.

24 Q And did you feel any kind of duty to investigate anything
25 that came before you or -- or --

1 A Certainly, I mean, that's part of the job as CEO is to
2 evaluate everything that comes in.

3 Q So, even though you had doubts, the suitors were willing
4 to press ahead anyway?

5 A I -- for example, in the York situation, they came in put
6 a legal team on the claims. Part of our -- our story is that
7 we don't believe that the August 10th ruling will hold up
8 under appeal. That's why we wanted to appeal so quickly. And
9 we would explain all the reasons why we think it won't hold up
10 under appeal. They would have their attorneys go off and have
11 litigators and IP specialists look at it and come back and
12 validate where we were coming from, saying, yeah, we agree
13 with you. We don't think it'll hold up under appeal either,
14 so we're interested in continuing this investment discussion.

15 Q With reference to the York deal, as you just finished
16 talking about, did this optimism change after the receipt of
17 objections by Novell and IBM and the Court's reservations at
18 that hearing?

19 A Yes, definitely.

20 Q And how did it change and what resulted?

21 A Well, the change was if Novell's objections are going to
22 be validated by this Court and the -- the discussion turns to
23 how can we do a deal with the product, the -- in question
24 here, with the UNIX business, then we're -- we're heading down
25 the wrong road here. If there's not going to be a deal done,

1 then we -- we're just going to get out now.

2 MR. LEWIS: Your Honor, I have to raise an
3 objection. That sounds an awful lot like it might be hearsay
4 in that the witness has not testified who he's testifying
5 about. Is he testifying about what he was told by York, in
6 which case it's hearsay. And if he's -- if he's only
7 testifying about what he believed, that's another matter and
8 I, frankly, am not sure what the relevance of it is. But if
9 it's what York was telling me, I think it has to be stricken.
10 I don't think it's admissible.

11 MR. SPECTOR: Your Honor, --

12 THE COURT: Mr. Spector.

13 MR. SPECTOR: I'd be happy to respond. Without the
14 case law I brought, because I'll save that for another issue.
15 When a person comes and says I have a contract and then sues
16 on an oral contract, let's say. He says, I offered this and
17 he accepted it. How did he accept it? He used his mouth. He
18 told me he accepted it. Well, that's a -- that's a verbal
19 act. And that -- I don't know if it's even considered an
20 exception to the hearsay rule. It's not hearsay. It's a
21 verbal act.

22 When you have the contrary, when you think you have
23 a deal and the other person says, I'm backing out because of
24 X, Y and Z, you also have a verbal act, the cancellation of
25 the negotiations on a contract. I submit that the case law

1 that supports a verbal act in the former carries the day on
2 the latter as well.

3 MR. LEWIS: Your Honor, I agree with counsel's
4 characterization of a verbal act to accept the contract. The
5 rest of it is testimony that would have to be given in a
6 breach of contract case. Nor, frankly, have we ever heard in
7 this case before that SCO believed that it had a contract with
8 York, that York has breached. In fact, we have quite the
9 opposite. We have SCO bringing a motion to award York fees
10 for getting involved in the case in the first place. So, on
11 two points, I think that evidence that -- and counsel's
12 argument just doesn't pan out.

13 THE COURT: I'm going to sustain -- I -- I will
14 sustain the objection as far as the -- seeking to elicit
15 testimony as to -- that bears upon the truth of the reasons
16 that York backed out.

17 MS. MAKOWSKI: I'm going to going restate the
18 question. I can do it and get the answer the right way --
19 another way. But, I'll just move on, I think --

20 THE COURT: Okay.

21 BY MR. SPECTOR:

22 Q All we know is that after the hearing, the deal unraveled
23 for whatever -- right?

24 A Correct. And what --

25 Q Okay.

1 A -- what I can tell you that is not subject to hearsay,
2 because I -- I read it an e-mail this morning before I came
3 over here, but I don't -- can't print it out and show you, is
4 that in October of 2007, York, the managing director we were
5 dealing with, sent me an e-mail saying, "Our counsel has
6 reviewed your claims in the District Court and we agree with
7 you that you will have this turned over on appeal."

8 MR. LEWIS: Your Honor, my -- I already told Mr.
9 Lewis, I'll stipulate. That's even worse hearsay than the
10 other one!

11 THE COURT: Yes!

12 MR. SPECTOR: And, I'll give you a second --

13 THE COURT: Yes!

14 MR. LEWIS: Worse in a lot of ways, Your Honor.

15 MR. SPECTOR: I'll give you a second ground for
16 objection. It's already been -- it's duplicative, because he
17 already testified to that --

18 THE COURT: Yes.

19 MR. SPECTOR: -- in less detail.

20 THE COURT: That testimony will be stricken.

21 MR. SPECTOR: Thank you, Your Honor.

22 THE COURT: Okay.

23 MR. SPECTOR: We'll go to another area.

24 BY MR. SPECTOR:

25 Q What happened after the York deal fell apart? Any other

1 deals out there that came -- came knocking?

2 A Yes. Steven Norris Capital Partners.

3 Q And, again, with the experience so recent, and the
4 painful experience of going through and spending hundreds of
5 thousands of dollars in legal fees to try to put together a
6 deal, that fell apart because of the uncertainties of the
7 business model of the company based on the August ruling. Why
8 would you sit down and start talking a similar deal with
9 Steven Norris Partners?

10 A It was a similar deal, but it was different. Part of
11 what we tried to learn from was the other York deal was a 363
12 asset sale. So, we tried to solve for the problem that was
13 presented here in the courts to say, well, if 363 doesn't
14 work, then maybe an injection of capital into the company
15 would work and then back the asset with, you know, if we don't
16 cover the debt, then they would take over. So, it's kind of a
17 backwards versing the 363, I guess.

18 So, I guess, we -- we tried to understand what didn't
19 work on the first round and -- and solved that problem on
20 round two.

21 Q Wasn't -- wasn't the uncertainty of the business model
22 any concern to the po -- potential investor?

23 A Well, there was definitely concern coming in, just like
24 York had, but there was also a view that when we sat down and
25 said, here are the issues in the Federal Court. We believe

1 these will be turned over on appeal. We had an audience to
2 that. There was a significant point in the Norris deal that
3 was negative towards us that in the very tail end of due
4 diligence with a large Middle East investor, where they were
5 very close to getting a deal done, they raised, in fact, the
6 question of an article that was in the press that was
7 headlined, "SCO owns -- owes 95 percent of its UNIX royalties
8 to Novell."

9 It was an absolute flawed statement. It was a flawed
10 headline. Even if -- if you read the article, you'd say,
11 well, this is flawed. We had to go through and -- and try to
12 educate those investors on why it was flawed. But,
13 nevertheless, there was an article out there that -- that
14 caused those -- the investors great concern.

15 MR. LEWIS: Your -- Your Honor, it's hearsay again.
16 What the investors were concerned about, only the investors
17 can testify to. Mr. McBride can testify to what he told them.
18 What they told him, but that's hearsay. He can testify that
19 after this article came out, somebody backed out. That
20 would not be hearsay. But he can't testify about the reasons
21 that -- that somebody gave.

22 MS. MAKOWSKI: That may be, Your Honor. But, I can
23 ask it in a way that it will come in though. If you could
24 give me a moment, I can --

25 THE COURT: Yes.

1 MS. MAKOWSKI: -- do that. Okay.

2 THE COURT: But, so, the -- the objection is
3 sustained and subject to a -- a new question.

4 MR. LEWIS: Thank you, Your Honor.

5 BY MR. SPECTOR:

6 Q Mis -- Mr. McBride, in the course of the due diligence
7 that Steve Norris Capital Partners undertook with you, were
8 you required to answer any questions?

9 A Yes.

10 Q Was -- what -- what -- was your staff CFOs and so forth
11 required to give financial information?

12 A Yes, we were.

13 Q Okay. Did you ever have to be called -- were you ever
14 called upon to explain a loss of 95 percent of the revenue?

15 A Yes.

16 Q And -- and what was your explanation?

17 A My explanation was that we didn't owe 95 percent on the
18 core business. That it was only on a trailing part of the
19 business that was not factored into our financials.

20 Q Did -- did that exchange, in your opinion, help or hurt
21 the prospects of getting this deal done?

22 MR. LEWIS: Objection, Your Honor. It calls for an
23 opinion. I don't know whatever --

24 MS. MAKOWSKI: I think --

25 MR. LEWIS: -- Mr. McBride's opinion is has to be

1 based on what he was told.

2 MS. MAKOWSKI: I don't believe that's true, Your
3 Honor. I think if anybody can give an opinion about the --
4 the momentum of a deal, it would be Mr. McBride with his vast
5 experience not only in this Court, but in others. I didn't
6 ask him, I think for interest of time, the deals that he -- he
7 did in his other positions. But, I believe if anybody can
8 give an opinion that something helps or hurts negotiation
9 momentum, it would be Mr. McBride. And I think it's a lay
10 opinion. We're not asking for an expert opinion from him.

11 MR. LEWIS: Mr. McBride, I believe can testify, Your
12 Honor, as to what happened afterwards to negotiations. I
13 don't think he's qualified to give an opinion here.

14 THE COURT: I agree with Mr. Lewis and I will
15 sustain his objection.

16 MR. SPECTOR: Thank you, Your Honor.

17 BY MR. SPECTOR:

18 Q What, if anything, happened to slow the deal down so that
19 it didn't come to fruition this summer?

20 A One of the things that happened was an article was
21 published that's --

22 Q Well, we've already covered the article. What else?

23 A Okay. There were -- one -- one of the big factor that
24 came up shortly after that publishing the article was the
25 Court hearing was scheduled, the trial was actually scheduled.

1 And so the investor was waiting to see the results of what
2 happened in the trial.

3 Q Anything else?

4 A The --

5 MR. LEWIS: Your Honor, same objection.

6 A -- the financial markets --

7 MR. LEWIS: It's hearsay.

8 THE COURT: I -- I -- I think it is hearsay. If we
9 can stick to facts as to the trial, that there were
10 negotiations. The negotiations ceased, you know, along those
11 lines, that would be acceptable.

12 MR. SPECTOR: I agree, Your Honor. Thank you.

13 BY MR. SPECTOR:

14 Q At the time this article which you referenced was brought
15 to your attention, --

16 A Yes.

17 Q -- how close were we to the trial in the end of April?

18 A We were about a month away at that point.

19 Q Okay. And while you were trying to dispel those doubts,
20 did the announcement of the trial occur?

21 A Yes.

22 Q Okay. And did the pace of negotiations pick-up or slow
23 down or stay the same once the date -- once the trial date was
24 announced?

25 A They slowed down.

1 Q What was happening with capital markets in the S -- that
2 period of time?

3 A The mortgage industry was going through a major meltdown.
4 Financial markets were rough and gasoline prices were going
5 through the roof.

6 Q At the inception of the second trial, or I shouldn't
7 say -- the -- the trial, in April, did Novell make any
8 concessions that had an impact on your discussions?

9 A Yes.

10 Q What was that announcement?

11 A They announced that they were dropping the amount of
12 their claims nearly in half and the part that they gave up on
13 was significant because it related to our UNIX work claims
14 that were question -- in question in terms of whether we owe
15 royalties on those or not.

16 Q Did that concession -- strike that. Did the pace of
17 negotiations suddenly increase, decrease or remain the same
18 based on those concessions?

19 A They decreased.

20 Q Okay. Do you have an explanation of why that would be?

21 A My experience from raising capital over 20 years of doing
22 it and raising nearly a half billion dollars of capital on
23 various fronts is that investors strive for certainty and the
24 more uncertainty you put into a situation, the more it
25 unsettles the ability to get a deal done. And with this

1 moving target, if you will, that was going on, starting with
2 that we owed them \$100 million for arbitration. When all that
3 went away, did we owe them \$40 million for the claims they
4 started with plus with -- including interest? Well, that was
5 now cut in half. Did we owe royalties on Unix Ware or not?
6 All of these things were -- were moving targets which weren't
7 actually helping, because you don't know what problem you're
8 solving for.

9 Q Eventually, Judge Kimball -- the trial was over and Judge
10 Kimball stated, as we know that he know, that he would rule
11 quickly because he understood the ramifications.

12 A Right.

13 Q Okay. And when did he finally rule?

14 A July 16th of this year.

15 Q Okay. Approximately two and a half months after the
16 conclusion of the trial that is?

17 A Correct.

18 Q Okay. And in that two and a half month hiatus, did
19 negotiations speed up, slow down or remain about the same?

20 A With some of the investors, they slowed down. We -- we
21 started some new negot -- new negotiations with another party.
22 But, generally speaking, there wasn't -- the -- the people we
23 had been talking to were waiting to see what the ruling was
24 going to be.

25 Q The investors that Mr. Norris was bringing to the table

1 were from what region of the globe?

2 A Middle East.

3 Q And in the month of August, are you aware of, for what is
4 traditional with regard to work patterns in the Middle East?

5 A Yeah, Europe and the Middle East tend to, especially in
6 the financial markets, tend to not be very active.

7 Q So, were you surprised that there was -- well, let me ask
8 you before I ask if you were surprised, was there any activity
9 to speak of in the month of August on the negotiation front
10 with Mr. Norris?

11 A There was one company based out of Paris that we had some
12 discussions about potentially merging with. But in terms of
13 raising capital, Steve told us that right after the --

14 MR. LEWIS: Objection, Your Honor.

15 THE COURT: Sustained.

16 WITNESS: Well, --

17 BY MR. SPECTOR:

18 Q Did -- did -- in Aug -- were there much negotiations with
19 Mr. Norris in the month of August with regard to the raising
20 of capital in the Middle East?

21 A No.

22 Q Okay. And do you attri -- what do you attribut that to?

23 A The -- the fact that they don't work much. They -- they
24 don't -- they're inactive in -- they're not out meeting with
25 people to -- to raise money during that month.

1 MR. LEWIS: Your Honor, it's an opinion again. I
2 think it's not admissible evidence. It's not competent
3 evidence. That's his opinion about why.

4 THE COURT: Well, we could deem -- we could obtain,
5 I think, some -- some background and groundwork for that
6 opinion based upon his experience with dealing with people in
7 Europe and so on. I don't think it's a tremendously
8 significant point, but I'll -- I'll sustain the objection,
9 because I think it is a valid objection.

10 MR. LEWIS: Thank you, Your Honor.

11 MR. SPECTOR: I -- I don't quote -- I don't quarrel
12 with that; however, the -- the testimony about August being a
13 month off was there and the Judge can draw -- Your Honor can
14 draw his own inference from that testimony.

15 BY MR. SPECTOR:

16 Q All right. You've -- how did Judge Kimball's July 16th
17 ruling clarify SCO's rights, if at all?

18 A The rights were clarified in a number of ways. Novell
19 had claimed we didn't have the right to do our SCO Source
20 licensing, which if that was true, that's -- that's a major
21 blow to us because we think that there is, again, billions of
22 dollars of claims out there to be collected on. And Judge
23 Kimball came back and reaffirmed our rights to do SCO Source
24 licensing. That was a -- it was a big deal for us.

25 He affirmed the rights to do the Microsoft license. He

1 affirmed that we owned all of the post-1995 copyrights to Unix
2 Ware. And he also affirmed that we had other ownership
3 rights, didn't quite spell out what they were, but came in
4 and -- and basically said, a lot of the things that were --
5 were going against us; from a rights standpoint were, in fact,
6 going in our direction.

7 Q What about the money damages issue?

8 A The damages issue was significant as well in our favor.
9 Again, right before the trial started, Novell had dropped
10 their claims from nearly \$40 million to 19. We go to the
11 trial and the outcome of that is not 19, but rather two and
12 half million, plus some interest.

13 Q I may have missed your -- part of your answer, because I
14 was -- my mind wasn't clearly on it, but did you mention in
15 your answer any reference to the Judge re -- reaffir --
16 reaffirming things that might have already been in the August
17 '07 ruling that were somewhat in doubt but were clarified by
18 the reaffirmation?

19 A Some of the things that I mentioned would include that,
20 such as the 1995 ownership of the UNIX rights. The other
21 thing that was important to that was this question mark around
22 did we owe Novell royalties for UNIX or not, Unix Ware or not.
23 That was an open question that Novell was -- was raising
24 against us. And he clarified that we did have all of the
25 rights on the Unix Ware business to move that forward. And,

1 significantly, he -- he had also ruled that any rights that
2 Novell may have had on royalties, vis a vis Unix Ware, expired
3 on December 31st of 2002. So, that -- that was a very big
4 cloud away from the ongoing business which was part of York's
5 issue.

6 MR. LEWIS: Your Honor, if I may just briefly, in
7 Judge Kimball's ruling is -- speaks for itself and I take this
8 to be Mr. McBride's understanding of Judge Kimball's ruling.

9 THE COURT: I think that's a fair --

10 MR. LEWIS: I don't want to have to argue later on
11 about what it really was.

12 THE COURT: Absolutely and I agree with that --

13 MR. LEWIS: Thank you, Your Honor.

14 THE COURT: -- certainly, Mr. Lewis. And I -- I
15 think that's what -- what it's intended for. But let's make
16 it clear that it is -- it is Mr. McBride's analysis, if you
17 will, personal analysis.

18 WITNESS: Color commentary, maybe.

19 THE COURT: Yes, commentary on the opinion, yes.

20 MR. SPECTOR: Thank you, Your Honor.

21 BY MR. SPECTOR:

22 Q Almost done. Has -- has that ruling made it easier,
23 harder or about the same to come to some kind of a deal in the
24 near future?

25 A We will be going back to the new set of investors next

1 week. Steve is leaving for the Middle East tomorrow and I'll
2 be joining him shortly after that. And we'll find out soon.

3 Q Okay. Now, you are aware, of course, that part of the
4 records that SCO has a fiduciary duty to the estate, which is
5 made up of creditors of the estate and unless and until the
6 Court -- the Court determines this to be an insolvent estate,
7 also to the cre -- the stockholders of the estate. There are
8 all sorts of plans that can be filed in a case. We could have
9 an auction and have everything sold on the court -- courthouse
10 steps. There could be mergers, there could be all sorts of
11 different options out there.

12 What does -- do you perceive the best option for the
13 debtor is to reorganize and get out of bankruptcy?

14 A I believe the best option is to complete a deal with
15 Steve Norris Capital Partners, bringing in an amount of
16 capital that's not 100 million like we talked about before,
17 but is enough money to take care of our issues to exit
18 bankruptcy, to fund the UNIX business going forward and to let
19 the existing estate stay back and complete its claims that it
20 has on the SCO Source front.

21 Q And you've already testified Mr. Norris is leaving
22 tomorrow to start that process and you're joining them shortly
23 thereafter?

24 A Correct.

25 Q If all potential deals don't pan out, are you willing,

1 albeit reluctantly perhaps, to file a reorganization plan
2 without the benefit of outside financing or divestiture?

3 A Yes.

4 Q When can you have that done?

5 A If the next round of investor visits doesn't go well, if
6 there is not -- with these clouds removed, with the
7 declassification from a Grade Five storm down to a Grade One
8 storm, or a tropical storm, whatever it is, is not sufficient
9 to still get somebody on board, then I think we should move to
10 the next stage and saying, you know, let's -- let's put a plan
11 together that aids us without having to -- the dependency of a
12 third-party to come in to the situation.

13 Q When is the company's new year? When does the company's
14 new year begin?

15 A Our fiscal year starts November 1. We're right now in
16 the planning stages of that. And a significant part of the
17 planning stages is, of course, do we have new capital to count
18 on or not. If we don't have the new capital to count on, and
19 I would say by, you know, as -- as we go through the end of
20 October, if we don't have any new capital to count on, as --
21 as the CEO, I want to be able to launch a plan that I have
22 some assurances with, even if it's not with a -- a capital
23 partner. And, so that would be the time frame that I would
24 look forward to try to come back to this Court and say, here's
25 a plan that we would propose to move forward with in the

1 alternative.

2 Q What pressure have you been under to answer the Board of
3 Directors' questions, employees' questions, outside investors'
4 potential questions regarding when you get to appeal the
5 ruling in Nove -- of August of '07? What pressure have you
6 been under personally to -- to answer that question?

7 A Well, it's continuous.

8 Q Well, explain it.

9 A It's the -- the questions are tied to -- let me back up a
10 step. The August 10th ruling obviously was, as I said, very
11 devastating to the company. And our reaction to that is to
12 put up a competent case about why we think that the ruling was
13 incorrect. It's sort of like a football game where you have a
14 deal where you're standing there. You're close to play and
15 you see this is not right and you want to send it up to the
16 instant replay booth. But then it's like sitting there for a
17 year and it's not that the replay has been reviewed, it's that
18 you -- you have to sit there for a year waiting from somebody
19 to say it's okay to review it. And, so, it's been very
20 frustrating.

21 Q All right. Where has the most pressure come from?

22 A It has come from customers. It has come from investors.

23 MR. LEWIS: Your Honor, hearsay. It has to be
24 hearsay. The only reason he's know about that pressure is if
25 people allegedly told me that was on their minds and that's

1 hearsay.

2 MR. SPECTOR: The question, Your Honor, is who --
3 who has been putting the pressure on your shoulders? Who's
4 been putting weights on your head? Who's been -- that is
5 sensory. He knows who's been doing these things and I don't -
6 - I think that is not a hearsay question.

7 MR. LEWIS: That was not what the question was. The
8 question was a question about pressure about when things were
9 going to get going. If he just wants to know about pressure,
10 are -- are customers and potential investors pressuring him,
11 that might or might not be admissible. I still think that's
12 hearsay. But that's not what the question was. The question
13 was a loaded question about the reason for the pressure.

14 MR. SPECTOR: --

15 MR. LEWIS: I don't think that he can answer that
16 question without indirectly but clearly adverting to hearsay
17 testimony.

18 MR. SPECTOR: The original question was have you
19 been getting pressure about when you can appeal and his
20 answer -- several questions ago was, "yes." From where? From
21 employees, from customers, from investors. Now, I asked him,
22 "Where has that pressure come from most?" I don't see how
23 that is any hearsay in any way. It's like if you're
24 getting -- if you're getting shot at from three different
25 directions, where's the heaviest fire coming from? I don't

1 see how that -- that's a hearsay. I'm not asking any --
2 anything that somebody told him. I'd ask you to overrule his
3 objection, Your Honor.

4 MR. LEWIS: Your Honor, the original question was
5 pressure about when you can appeal. That's what the hearsay
6 is. And if he's getting --

7 THE COURT: But there was no objection to that
8 question.

9 MR. LEWIS: Well, Your Honor, I was waiting to see
10 what he would be testifying to about where it was coming from.
11 And -- and I do think it's objectionable if it's coming from
12 third parties.

13 MR. SPECTOR: Your Honor, it's not being offered for
14 the proof -- the truth that -- of anything that somebody is
15 saying because we're not asking what anybody is saying. It's
16 like, what are -- you know, where did you get the most hours
17 from? What did -- and then where did you get the most bullets
18 from? Or where did you get the most questions about this
19 issue from? I -- I don't -- I -- I think you should overrule
20 this objection.

21 THE COURT: I'm going to overrule the object --

22 MR. LEWIS: Your Honor, if I might just comment.

23 THE COURT: Yes, Mr. Lewis, --

24 MR. LEWIS: -- very quickly on --

25 THE COURT: -- please. Okay.

1 MR. LEWIS: -- counsel's response. If all we're
2 talking about is he feeling pressure, that's irrelevant to
3 this hearing. The only reason -- the only reason that
4 question was asked is the debtor is trying to show that it's
5 getting pressure about when people -- when it can appeal
6 from -- from creditors, not -- it's not trying to show that
7 Mr. McBride is feeling a lot of pressure, period. And, so,
8 counsel's explanation doesn't wash in light of the original
9 question and the purpose of the question. And if his only
10 question is really, Mr. McBride, are you feeling a lot of
11 pressure, Mr. McBride can answer that question, but I think
12 it's irrelevant.

13 MR. SPECTOR: I renew my argument, Your Honor.
14 It -- it's not hearsay.

15 THE COURT: I agree that it's -- that that question
16 is not in and of itself hearsay. And I will overrule that
17 objection.

18 BY MR. SPECTOR:

19 Q Among the reasons that you've already testified -- well,
20 can you tell us from SCO's perspective, not what other -- not
21 other people's perspective, why you haven't had a deal?
22 What's the impediments to bringing a deal to the table as of
23 now?

24 A I would say the single largest impediment is the fact
25 that we have not -- it -- first of all, it's the ruling that

1 we had on August 10th. And, secondly, the inability to file
2 an appeal against that ruling.

3 MR. LEWIS: Your Honor, I reserve the right to ask
4 the witness about his basis for the second point.

5 THE COURT: You -- you will be so entitled.

6 MR. LEWIS: Thank you, Your Honor.

7 BY MR. SPECTOR:

8 Q Were you and SCO encouraged when Judge -- Judge Kimball
9 ordered Novell to propose a final judgment in ten days?

10 A I'm sorry. I was --

11 Q Were you and SCO encouraged when Judge Kimball --

12 A Yes.

13 Q -- ordered -- okay.

14 A Yes, absolutely.

15 Q Do you have an understanding of whether Novell has
16 performed that request to turn the judgment in in ten days?

17 A My understanding is that they have not.

18 Q Do you believe that impacts customers and partners and
19 investors?

20 A Yes, every -- every day that we don't have the appeal
21 filed is -- is a negative impact on us.

22 MR. SPECTOR: Your Honor, we pass the witness.

23 THE COURT: Thank you. Mr. McMahon.

24 MR. McMAHON: May we be heard for a moment, Your
25 Honor?

1 THE COURT: You may. Good morning.

2 MR. McMAHON: I have an 11:30 a.m. first day hearing
3 before Judge Shannon.

4 THE COURT: Oh, certainly.

5 MR. McMAHON: And I would like the opportunity to go
6 down to -- to -- to chambers and address that issue.

7 THE COURT: Of course.

8 MR. McMAHON: I'm happy to proceed whichever the
9 Court would like.

10 THE COURT: Are you going to -- did you want to
11 weigh in on this issue before the Court at this point, or --

12 MR. McMAHON: Well, it -- Your Honor, perhaps that's
13 probably the best way of -- of --

14 THE COURT: I mean, I don't want to delay you
15 either. But, it may not take long for you to express your
16 views.

17 MR. McMAHON: Yeah, and --

18 THE COURT: Let's see --

19 MR. McMAHON: -- and I --

20 THE COURT: -- if we can -- let's see if we can
21 do -- do them now.

22 MR. McMAHON: Okay. If -- if counsel doesn't have
23 an objection to that?

24 MR. SPECTOR: No, I'm happy to accommodate you.

25 MR. McMAHON: And -- and -- and I appreciate the

1 courtesy that the debtor's counsel offered our office in terms
2 of airing our views on the motion without the necessity of
3 filing formal papers.

4 Your Honor, first thing, as noted in Novell's
5 objection, we wholehearted agree with the -- the technical
6 issue about the --

7 THE COURT: The indefinite extension.

8 MR. McMAHON: No way.

9 THE COURT: Right.

10 MR. McMAHON: And -- and I -- I think even debtor's
11 counsel is aware of our view that that can't -- can't occur.
12 But, and, independent of whatever cross Mr. -- I'm sorry,
13 Novell's counsel may elicit, I think the bottom line here is,
14 Your Honor, the -- the explanation that's been offered with
15 respect to needing to have the -- the judgment entered to move
16 this case forward, I -- I don't think washes in -- in -- in
17 the entire -- the -- the run of these cases. The testimony
18 that -- that the Court just heard with respect to coming to
19 the for -- with respect to the York and the Norris deals, the
20 debtor's had ample opportunity to come forward and propose a
21 plan to date.

22 And, you know, basically, Your Honor, for
23 substantially the same reasons that are stated in the Novell
24 objection, we would object to a -- a further extension to the
25 extent that, you know, they're -- they're -- the Court

1 disagrees with -- with that position based upon the evidence.
2 And, Your Honor, we -- we suggest that that's not likely to be
3 the case. Whatever relief the Court is willing to grant
4 should be -- should be limited to a -- a finite, very highly
5 curtailed term because that -- that is what the -- the -- the
6 circumstances of this case are.

7 We -- we are a year into it. These debtors are --
8 are -- have burned a -- a -- a substantial amount of cash
9 operating to date. And -- and we have to get from Point A to
10 Point B.

11 THE COURT: Thank you, Mr. McMahon.

12 MR. McMAHON: And -- and, with that, Your Honor,
13 if -- if you -- if I may be excused to --

14 THE COURT: Absolutely.

15 MR. McMAHON: -- to address the other one.

16 THE COURT: I appreciate your --

17 MR. McMAHON: Thank you.

18 THE COURT: -- coming forward. Thank you.

19 MR. McMAHON: Thank you.

20 THE COURT: You may be excused.

21 (Mr. McMahon exits courtroom)

22 THE COURT: Mr. Lewis.

23 MR. LEWIS: Thank you, Your Honor.

24 CROSS-EXAMINATION

25 BY MR. ADAM A. LEWIS:

1 Q Mr. McBride, is the debtor prepared to stipulate for a --
2 to a judgment in favor of SuSE and the arbitration in
3 Switzerland?

4 A I would have to talk to our counselors involved with that
5 with the Boies, Schiller team.

6 Q So the answer now is not yet? Whether you might at some
7 point in the future, you're not prepared to do that now?

8 A We filed some things yesterday. I just don't want to
9 state incorrectly what we -- we filed. I know that the
10 statement earlier with respect to us not filing things with
11 prejudice was incorrect, because I understand we did file them
12 with prejudice and that we're ready to move forward.

13 Q You're prepared to dismiss the arbitration to stipulate
14 to a judgment in Switzerland with prejudice?

15 A I don't -- that's not my understanding. I -- I --

16 Q Okay. I'm just asking what you're prepared to do today
17 and what your understanding is today. You -- I'm not binding
18 you to changing -- that you can't change your mind after
19 converting or something else. I'm just asking what the record
20 is today.

21 A The answer is I don't know.

22 Q Okay. You don't know whether you're prepared to
23 stipulate to that today?

24 A I don't know what our outside legal counsel's position on
25 that is.

1 Q Okay. But you have not agreed to do that; is that right?

2 The debtor has not agreed to do that?

3 A I don't know.

4 Q Who would know besides outside legal counsel?

5 A My general counsel would know.

6 Q Okay. So, your general counsel makes those decisions for
7 the company?

8 A On legal matters, he's the one that makes key decisions
9 on --

10 Q And so, if he makes the key decision, you don't -- you're
11 not part of that? Let -- let me -- that's a bad question. If
12 he makes a -- a key decision, you don't have any role in
13 reviewing and finalizing that decision; is that right?

14 MR. SPECTOR: Your Honor, I rise to object only
15 because I didn't -- I didn't mean -- mean -- mean to interrupt
16 previously, but the whole thing is -- is -- it calls for legal
17 conclusion of this witness who is not a lawyer. He has legal
18 counsel. He has two legal counsel here pertinent to this
19 issue. I -- I think this line is -- is overlong to begin
20 with. And cross-examining him about that, I think, is -- is
21 almost overbearing.

22 MR. LEWIS: Your Honor, the -- the debtor has
23 purported to put the blame on Novell for the state of things
24 in the District Court and has also purported to tell the Court
25 that everything is going to be honky dory with its filing

1 yesterday, because it's willing to dismiss the claims in Utah.
2 I'm just trying to find out why we're holding out on the
3 arbitration, which is the whole reason we're delayed. And I'm
4 just asking a question. I'm not asking for a legal opinion.
5 I'm asking for a decision by the company. That's all --

6 THE COURT: Well, --

7 MR. LEWIS: -- I'm asking for.

8 THE COURT: -- well, I'm concerned that we're
9 getting into sensitive legal strategy here.

10 MR. LEWIS: I'm -- I'm -- Your Honor, --

11 THE COURT: -- on the part of the --

12 MR. LEWIS: -- I'm not going to ask him to explain
13 his decision or who he talked to or anything. I'm just asking
14 for a yes or no answer.

15 MR. SPECTOR: Well, I believe he got that, Your
16 Honor. He got the -- he doesn't know. The witness said, he
17 doesn't know.

18 MR. LEWIS: And I'm just trying to find out what he
19 doesn't know really means. Because he said he doesn't know
20 because someone else makes those decisions and I'm just trying
21 to be clear that he -- that the management of the company
22 doesn't make those decisions. The leg -- the general counsel
23 makes them and I just want to be clear about that.

24 THE COURT: Well, I'll let you follow-up on that
25 question.

1 BY MR. LEWIS:

2 Q So, the question is, Mr. McBride, is that a decision that
3 general counsel makes on his own or is it a decision that you
4 review as the CEO and President?

5 A I'm involved in -- in major decisions on legal issues and
6 I just don't know what the status of that question is that you
7 asked me.

8 Q Right. You haven't decided -- you have made no decision
9 to stipulate? Again, I'm not asking you for reasoning behind
10 it, just asking for a fact. Is that right?

11 A Right.

12 Q Okay. Now, towards the end of your testimony, you were
13 asked what -- if the debtor can't drum anything else up, in
14 terms of a plan with third parties, when would the debtor be
15 prepared to file a plan? Did I understand you correctly to
16 say that you would be pre -- prepared to file a stand alone
17 plan by the beginning of November of this year?

18 A I think -- I -- I was -- my response, Mr. Lewis, was
19 with -- with respect to how we would run the company and I
20 personally would like to know by the beginning of November
21 whether we have outside funds to count on. The technical
22 aspects of filing a plan and disclosure statements and all
23 that, having gone through this a time or two, I know is more
24 complicated than the day you say, here's the way we're going
25 to go and the day the plan is filed are two different things.

1 So, I refer to Mr. Spector with respect to actual dates. But
2 from the company perspective, yes, we would -- we would like
3 to start the new fiscal year having an understanding of
4 whether we can count on outside funds or not.

5 Q Okay. But in terms of actually proposing a plan, that
6 might be November, December, January, February, --

7 A Well, --

8 Q -- whatever?

9 A -- so, let's -- let's say that we came to some kind of
10 conclusion on where we were with Mr. Norris and the -- now
11 that the -- the claims have settled down somewhat in the Utah
12 Court, they haven't totally because they haven't filed the
13 appeal. At least there's -- there's a new level of discussion
14 we can have with investors we didn't have a year ago. We will
15 be visiting them here in the coming weeks. We sort all of
16 that out by the end of October. And we make a -- sort of a
17 go, no-go decision.

18 Then, I would say, we're either in the process of
19 finalizing an investment package or we are coming back
20 saying, you know, given the times that we're in, the markets
21 we're in, the state we're in, it doesn't appear that there --
22 there will be outside funds. And, so, here would be our
23 alternative plan that we had proposed to the Court and
24 whatever time that takes to put together, I don't -- I
25 wouldn't think it would be months. But, it -- it probably

1 would be weeks, I would guess.

2 Q Okay.

3 A -- from the first part of November.

4 Q Now, in terms of the SNCP plan and the York deal that you
5 testified about, I take it that you believed you were acting
6 consistently with your fiduciary duty when you authorized the
7 filing of the York motion and the filing of the SNCP plan; is
8 that right?

9 A Correct.

10 Q Okay. Now, the -- the SNCP plan, let me ask you a little
11 bit about that.

12 A Sure.

13 Q SNCP was making \$100 million available; is that right, as
14 part of that plan?

15 A The -- the plan was to raise around \$100 million, or up
16 to \$100 million, I believe is what I stated.

17 Q If you needed it, right?

18 A That was -- that was the initial plan that was put
19 together. And as they went into due diligence, that morphed
20 into a plan that was more of an equity plan for the major part
21 of the business, which was the UNIX business.

22 Q Okay. When you say morphed into an equity plan, when did
23 that take place?

24 A I believe the investors came back to us in the March time
25 frame with that retooled vision of how the plan would come

1 together.

2 Q Okay. And, so, that was not the plan -- the -- the
3 retool plan was not the plan that was on file; is that right,
4 or is it?

5 A I -- I can't remember if we -- I don't remember the
6 timing of what we filed. I know that when we started off with
7 NCP -- SNCP, it was highly debt driven and then over time
8 it -- it morphed to more of an equity driven plan. I don't
9 recall off-hand which one is on file right now.

10 Q Even the one that was debt driven had the power of SNCP
11 to convert a substantial portion of this debt to equity; isn't
12 that right?

13 A Yes.

14 Q Okay. So, in that sense, equity was at risk even under
15 that plan unless the debtor could find a way to repay and even
16 then I believe, SNCP had the power, did it not, to convert
17 whether you wanted it to or not?

18 A I believe that's correct. I believe that there were some
19 stipulations that tied to the judgment. I -- I don't remember
20 exactly off-hand as we sit here today.

21 THE COURT: If I could just interrupt for one
22 minute, just -- just -- no, no, no. It's not with this matter
23 at all. But I know that there are counsel in the courtroom
24 for a hearing that was supposed to start at 11. And we are
25 going to adjourn that hearing until 2:30. Thank you, Mr.

1 Lewis.

2 MR. LEWIS: I apologize to counsel.

3 THE COURT: I'm sor -- I'm sorry for the
4 interruption.

5 MR. LEWIS: No, it's quite all right.

6 THE COURT: Forgive me.

7 BY MR. LEWIS:

8 Q In terms of the litigation with SCO with Novell and
9 putting aside the arbitration issues and how they might impact
10 the Utah litigation, what else does SCO need to know about the
11 outcome of the litigation, the substantive outcome of the
12 litigation in order to proceed with planning its future?

13 A The ultimate rights to the UNIX business, again, while
14 somewhat cleared up, getting that fully established as to
15 what our underlying rights are to UNIX is critical to the
16 company --

17 Q Okay. So, --

18 A -- to move forward.

19 Q -- but that would be decided on appeal; is that right?

20 A Yes.

21 Q So, there's nothing further, as it were at the trial
22 level, that you need to know, SCO needs to know, in order
23 to -- in order to try to plan its future subject, of course,
24 to whatever negotiations it has with other parties. But you
25 know what there is -- what you need to know at the moment; do

1 you not, whose -- what the rights are at least at the trial
2 level and how much you're owed or how much you owe to Novell?

3 A Subject to the current negotiations and wrangling that's
4 going on between SCO and Novell, yes, --

5 Q But, that wrangling --

6 A -- I agree with that.

7 Q -- isn't over any of the terms; is it? It's only over
8 when the judgment would be entered; isn't that right?

9 A Well, it's over a judgment. It's over interest. It's
10 over, you know, --

11 Q Haven't the parties reach an agreement on the interest
12 factor and on the trust -- and honor the trust?

13 A I think that that's part of what we just came to, right.

14 Q Okay. So, those aren't factors anymore. So, there's
15 nothing else you need to know; isn't that right?

16 A Nothing else I need to know with respect to what?

17 Q Whatever could be decided at the trial level, putting
18 aside -- putting aside this -- the arbitration and its impact,
19 and putting aside whatever could be decided on appeal, you
20 know everything there is to know about that litigation; do you
21 not now?

22 A I believe we're getting there.

23 Q Say it again?

24 A I -- I believe we are getting there.

25 Q What -- what else do you need to know that you haven't

1 gotten there yet?

2 A Well, I'm trying to -- my mind's just trying to go right
3 now. You've asked me for a definitive statement and I'm --
4 I'm trying to go through and think of all of the things that
5 are on the table.

6 Q Anything major that comes to mind that you need to know
7 yet?

8 A I -- I can't think of anything as I sit here right now.

9 Q Okay. Now your counsel said in argument today that the
10 UNIX business was sort of just planned itself out, that the
11 real business now was the mobile business. Do you remember
12 that testimony -- that argument?

13 A I'm not sure he said it quite that way, but the essence
14 of it was somewhere along that line, yes.

15 Q And do you agree with that?

16 A The -- the real business of the company is -- well, we,
17 as I said earlier, we have three businesses. We have the UNIX
18 business. We have the mobile business. We have the SCO
19 Source business.

20 The UNIX business, while trailing off as Mr. Spector very
21 clearly articulated, is also one that is, as he said, has a
22 very long tail. And the importance of that is that it is not
23 going to go away for a very long time, if ever. So, from that
24 standpoint, one can make the argument that the UNIX business
25 is the most valuable because of this huge mass of installed

1 base of over two million servers that we have. So, I wouldn't
2 say that it's not important. I would -- I think the way you
3 depicted it was that it has -- had some downside of its -- its
4 revenue stream.

5 The -- well, never mind. I -- I answered the question.
6 That's okay.

7 Q If you want to add to your answer, that's fine.

8 A Well, I think the -- the mobility business is important
9 from an investor standpoint. Investors typically like to
10 in -- invest in things that are up and coming, but they also
11 want to see revenue attached to that. The UNIX business,
12 while trailing off in revenue, at least has revenue and that
13 thereby becomes a shoppable asset.

14 Q Now, in -- in your testimony, I think, at one point you
15 testified that when you got -- when Novell agreed, pre-trial
16 that its claims were smaller than they had -- they had
17 originally asked for. Negotiations actually slowed; is that
18 right? Do you remember that testimony?

19 A There -- there was a slowing and that was one of the
20 elements, yes.

21 Q So, some times not knowing slows things and sometimes
22 knowing slows things it seems like; is that right?

23 A Uncertainty is not helpful in an investment world.

24 Q But there was uncertainty before Novell agreed that its
25 numbers were smaller; is that right?

1 A There -- there was a belief at the time that there was a
2 number that -- that the investors were solving for. And then
3 that number over a period of months shifted several times.

4 Q And -- but it's getting smaller didn't improve your
5 relationships with your potential investors because the
6 company was more attractive because its debts were smaller?

7 A It --

8 Q I mean, --

9 A -- it doesn't --

10 Q -- nobody knew what the outcome would be for sure, but
11 they knew already that it was going to be substantially less
12 than you had been projecting?

13 A No, it's -- it's a two part equation. It's not just
14 the -- the investors' view of us. It's SCO shareholders' view
15 of what investment to take and how much dilution to take.
16 And, so, it's a two part equation.

17 Q And I understand that, yes.

18 (Pause)

19 A To that point, I had an investor call me after the ruling
20 came down and said, "Do we even need to take any investment
21 now?" I mean, it -- let's -- let's not take any dilution,
22 right? And, so, yeah, at one level, that would be nice. That
23 would be -- you know, that would be a nice outcome. But the
24 reality is, we have pre-petition debts to take care of. We
25 still have the situation here that we think we'll get will get

1 turned over on appeal that we're not sure that we can exit
2 with a plan or a plans to exit, where in the worse case,
3 everyone is taken care of, including your client. So, you
4 know, then, again, it -- it just changes the nature. Instead
5 of a \$40 million deal with heavy dilution, some investors
6 would say, let's -- let's do no dilution. You know, what
7 we're striving for is something in between where we can allow
8 the UNIX business to grow. We can take care of our debts. We
9 can exit bankruptcy and -- and move on.

10 Q The SNCP plan had that kind of flexibility; did it not?
11 It would depend on how much you needed to borrow because that
12 would in turn depend on what the claims were against you as
13 ultimately determined. You were going to pay certain claims
14 on confirmation and then you were going to pay the Novell and
15 other claims that were subject to litigation later on. And if
16 you had to borrow money on that \$100 million line of credit to
17 do the latter, you would do that. But if you didn't, you
18 wouldn't, right?

19 A The -- the SNCP deal that you're referencing was tied to
20 a group that we were working with that was talking about those
21 kind of terms. Now, that deal is not on the table. So, we're
22 off looking for a new partner.

23 Q Okay. So, the retooling of the SNCP deal that appears in
24 the papers that the debtor has filed, in fact, papers the
25 debtor filed when it withdrew the -- the plan and the papers

1 that it's filed in connection with this. That plan is no
2 longer even of any kind. It's not even in existence right
3 now. You have no -- no potential deal with SNCP; is that
4 right?

5 A We have a deal with SNCP to finalize and -- and a third
6 party investor that would be subject to, if not those terms, a
7 different set of terms and as, again, we're heading to the
8 Middle East again tomorrow. We will find out soon whether
9 that comes to fruition or not. If not, then I would say we
10 don't have a deal with SNCP.

11 Q And when did you reach that potential deal with SNCP?

12 A Which potential deal?

13 Q The one that you had just described --

14 A We -- we sat down --

15 Q -- that depends on --

16 A -- in July after the ruling came out and we sat down and
17 looked at it. Again, we had some investors saying, why take
18 any money? We have the other side here saying, well, let's
19 take money down. There's -- there's -- and then there's a --
20 another opinion that says move -- move through this without
21 investments, really the -- the first argument there. That
22 we -- we believe that it is in the best interests of our stake
23 holders, our shareholders, to go and, you know, with -- with
24 the new facts that we have, which is we're not solving for a
25 \$40 million problem, we're solving for a two and a half

1 million dollar problem.

2 We have rights that we can shop that are clear now
3 that -- that weren't clear before. That we have the mobility
4 business where it is. And, so, we have retooled our entire
5 investment pitch that will now be put in front of these --
6 these other potential investors and we'll see where that goes.

7 MR. SPECTOR: Mr. Lewis, for a moment.

8 THE COURT: Yes.

9 MR. SPECTOR: I rise only to clarify a nomenclature.
10 The term investor has been used in a number of different ways.
11 I think what Mr. McBride's been saying in the last few minutes
12 when he talks about investor, I think he means current
13 stockholders.

14 THE COURT: That was how I understood it. That --
15 I --

16 MR. SPECTOR: Okay.

17 MR. LEWIS: That's how I understood it, too, Your
18 Honor.

19 THE COURT: Yes, it's helpful, Mr. Spector. Thank
20 you for clarifying the record, though.

21 BY MR. LEWIS:

22 Q Now, in your discussions with various parties in the last
23 few months, including since July, have you indicated them --
24 to them an urgency to get a deal done so that you can get a
25 plan on file?

1 A Sure.

2 Q Okay.

3 A We -- we've really had two fronts that we've worked
4 through this summer. We've had a company that we entertained
5 the notion of doing a merger of equals, company based in
6 Paris. This was another -- this was somebody that SNCP
7 introduced us to in Europe in the early Summer. We went
8 through a number of cycles with them. And, again, after the
9 16th ruling came out, it became clear to us that going through
10 a merger of equals with them and then putting more capital on
11 top of it was going to be high diluted to shareholders and we
12 backed away from that plan. So, that was one that was -- it
13 consumed a lot of our time during the summer.

14 The -- the second point then was once the 16th ruling
15 came out, we sat down and said, with these facts, with the
16 investment thesis changing now from what it was, let -- let's
17 go back and reintroduce the concept to Steve's stable, if you
18 will, of investors that he does deals with. And the time
19 frame that was established in July was, you know, the -- the
20 second week or so of September. And, for various reasons,
21 that was why we established that.

22 Q Between the time that the debtor took -- took its plan
23 off file in early April of this year and the decision in the
24 trial in July, how active was the debtor in terms of
25 discussing potential plans and deals with parties?

1 A Steve's been active from February up until now.

2 Q Okay. Anyone else have you been discussing with now?

3 I'm not going to ask you to identify anybody just yet and I
4 may not at all.

5 A We've -- we've had some other potential opportunities
6 that have arisen mostly around our mobility business. But
7 with respect to the main thing that we've been talking about,
8 it's all been with Steve.

9 Q Okay. Let me ask you to elaborate just a little bit.
10 During that period where your main contacts have been with Mr.
11 Norris, --

12 A Yes.

13 Q -- and his potential capital sources, --

14 A Yes.

15 Q -- and a couple of deals that apparently came to you
16 about the mobility business, was the debtor reaching out to
17 other potential -- I'll just use the word, "white knight" for
18 the -- and investor could be a lender. It could be whatever
19 the deal was, someone -- a planned sponsor.

20 A Well, the answer is no. We were -- we had Steve as a
21 partner and he has very deep capital connections and that's
22 what we've been working on since, you know, the Spring time
23 frame.

24 MR. LEWIS: Your Honor, I have no further questions
25 for the witness. Thank you. Mr. Spector.

1 THE COURT: Thank you, Mr. Lewis. Thank you, sir.
2 Mr. Spector, any redirect?

3 MR. SPECTOR: Yes, I'm not sure I heard the last
4 question or understood the answer correctly.

5 REDIRECT EXAMINATION

6 BY MR. SPECTOR:

7 Q With respect to the last several months, are you saying
8 the debtor didn't reach out to any other groups?

9 A We had, as I said, a number of discussions going on with
10 respect to the mobility business.

11 Q Were there any financial discussions other than -- well,
12 let me strike that. How about borrowings? Did you seek --
13 have any discussions with anybody about borrowing money?

14 A We were always in a state of trying to see, you know,
15 what --

16 Q Well, answer this specifically. In the last several
17 months, did you have talks to somebody about financing,
18 smaller capital amounts, smaller amounts, five, ten million
19 dollars?

20 A Yes.

21 Q All right. And -- and you talked about mobility. You
22 had talks with other groups about if they wanted to buy
23 mobility?

24 A Yes.

25 Q All right. So, other than the big deal with Steve

1 Norris, you had other -- other things brewing?

2 A Yes, and I guess --

3 Q Okay.

4 A -- the -- the point of clarification there is that Steve
5 was aware of these other deals we had. But we didn't want to
6 get in a situation where he viewed us as -- as competing
7 against deals that we were working on. So, he was -- he was
8 well aware along the way of other discussions we had.

9 MR. SPECTOR: That's all I have, Your Honor.

10 THE COURT: Thank you.

11 MR. LEWIS: I have nothing --

12 THE COURT: Any recross?

13 MR. LEWIS: -- further, Your Honor. Thank you.

14 THE COURT: All right.

15 MR. SPECTOR: The only -- you may step down.

16 THE COURT: Thank -- thank you very much, Mr.

17 McBride.

18 MR. SPECTOR: Thank you, Mr. McBride.

19 THE COURT: Please step down. Thank you.

20 MR. SPECTOR: I'd just ask the Court to judicially
21 notice the pleadings from the Novell-SCO litigation in Utah
22 that are attached as exhibits to our reply.

23 THE COURT: Any objection to that, Mr. Lewis?

24 MR. LEWIS: No objection, although I think taking
25 judicial notice of those has to be qualified because Novell

1 hasn't had a chance to reply to those in Utah.

2 THE COURT: Understood.

3 MR. LEWIS: Nor, indeed, have I really had a chance
4 to study them or confer about them.

5 THE COURT: Thank you. I will certainly take
6 judicial notice of the fact that they have been filed and not
7 ascribe any truth to them, if you will.

8 MR. LEWIS: I can't quarrel with that, Your Honor.
9 Thank you.

10 THE COURT: Okay.

11 MR. SPECTOR: Yeah, of course, they're -- they're
12 pleadings.

13 THE COURT: Right.

14 MR. SPECTOR: And they're written by lawyers. I
15 understand that. However, there are positions taken there.

16 THE COURT: Precisely.

17 MR. SPECTOR: Okay. And -- and the positions --

18 THE COURT: And --

19 MR. SPECTOR: -- are of some relevance.

20 THE COURT: -- and those -- those positions are
21 relevant and, certainly, I understand that.

22 MR. SPECTOR: And, with that, Your Honor, we have no
23 further proofs.

24 THE COURT: Okay. Thank you. Anything further --

25 MR. LEWIS: No, Your Honor, thank you.

1 THE COURT: -- from your side, Mr. Lewis?

2 MR. LEWIS: Just closing argument when Mr. Spector
3 is done, if he has --

4 THE COURT: Mr. Spector, would you like to close?

5 MR. SPECTOR: Your Honor, you -- you heard a fulsome
6 opening statement on the -- on the possibility that that would
7 be all there will -- was. So, I'm not going to regurgitate,
8 I know people use that term a lot, all the things I said
9 before. The record, you have supports the importance of
10 the - the rulings in Utah, the -- the body blow in July -- in
11 August -- August of last year and the, I don't know, the
12 splints that were put on the -- the wounded body in July of
13 '08.

14 Your Honor has previously noted at page 24 of the
15 transcript of the last hearing for exclusivity extension, in
16 reference to the question about how important is exclusivity
17 of the debtor -- actually, it wasn't even a question. It was
18 Your Honor, sua sponte, raising the issue and I'll quote, on
19 page -- page 24, line 13:

20 "And to the extent that exclusivity is removed from
21 the debtor, that would only further interfere with the
22 debtor's ability to negotiate the plan with the deal and,
23 thus, the plan."

24 So, I -- I don't need to argue this point. Your Honor raised
25 it on his own. It wasn't even argued by me that much, I don't

1 believe at all, at the last hearing.

2 So, in response to Mr. Lewis's suggestion that, you
3 know, who cares! How important is exclusivity? We're not
4 converting the case today. We're not appointing a trustee.
5 How important is exclusivity? Your Honor knows how important
6 exclusivity is when you're in negotiations.

7 Second of all, I could turn it, almost like in every
8 other argument, if it's not so important, why are you here
9 fighting it? What's so important to you? Why do you care
10 unless you've got a plan in your back pocket that's going to
11 dismember us? Why do you care if we have another few months?
12 It's not like -- it's not like you're counting on us having
13 that money today that we're squandering it tomorrow.

14 This is Novell. This is a -- a three and a half
15 million dollar judgment that they'll eventually get, that
16 they'll have to fight millions of dollars in appeals to get
17 to! That's not it. So, the real question: if you want to
18 say why are you fighting so hard to get it, why are you
19 fighting so hard to keep it from us? I think Your Honor knows
20 the answer to that.

21 There was also something that Your Honor said that
22 was of interest and I'll reiterate it again today and this was
23 also sua sponte by the Court and it was on page -- I wrote it
24 down here before, if I can only find it -- oh, page 18 of the
25 transcript, Your Honor.

1 You asked a question of Mr. Lewis then, which I
2 through you will ask again: "Is there any prejudice that you
3 would point to if the extension is granted?" I -- I haven't
4 heard Mr. Lewis -- I didn't hear Mr. Lewis the last time and I
5 certainly haven't heard him today suggest there's any
6 prejudice to Novell.

7 Mr. McMahon has a different focus, and I appreciate
8 what he is there to do. There's no unsecured creditors coming
9 in this case. And I don't say to Mr. McMahon, who's not here
10 to defend himself, you know, what's your ax to grind? He has
11 an ax to grind. He's there to protect the unsecured creditors
12 who have been silent.

13 And -- and I -- I -- I do think there's something in
14 their silence, however. If these aren't babies that are out
15 there for the few million dollars, they're substantial
16 creditor -- substantial customers -- strike that -- not
17 customers, substantial creditors, companies that have
18 commerce, have their own lawyers. They're not here.

19 We always have intended to pay them in full. We
20 still can pay them in full, if the worse should happen.
21 They're still doing business with us. We're paying as we go.
22 Notwithstanding Mr. McMahon's skeptical comments, we -- we
23 don't see that there's a prejudice to anybody else anymore
24 than there's a prejudice to Novell if we got this simple
25 extension.

1 So, with those final comments and not regurgitating
2 all of the other points, I'll stand down, --

3 THE COURT: Thank you.

4 MR. SPECTOR: -- unless Your Honor has some
5 questions for me.

6 THE COURT: I don't have any questions at the
7 moment. Thank you, Mr. Spector. Mr. Lewis?

8 MR. LEWIS: Thank you, Your Honor. Let me turn
9 first to the question of prejudice.

10 THE COURT: That --

11 MR. LEWIS: First of all, --

12 THE COURT: -- I -- I understand. That technically
13 is not the issue.

14 MR. LEWIS: It is not an issue, Your Honor, and it's
15 importantly not an issue and, contrary to what Counsel has
16 said, there are Courts that recognize the very fact of the
17 termination of exclusivity is one thing that can adduce a -- a
18 debtor to do its very, very best to get something on file in a
19 reasonable amount of time, not wait for the perfect deal, the
20 perfect advantage, and that's the -- the Newhall Hospital case
21 we cited.

22 THE COURT: Yes.

23 MR. LEWIS: They specifically talk about that and
24 that's what Congress envisioned. Congress didn't say there
25 has to be prejudice. Congress just said at some point or

1 another if the debtor's not getting there, there needs to be
2 some pressure on the debtor and sometimes the pressure is the
3 absence of exclusivity. And if there ever were evidence that
4 there would be such pressure, it is to turn SCO's argument on
5 its head, SCO's fierce opposition to termination of
6 exclusivity.

7 And I want to emphasize it again, we're not talking
8 about the death nail of this case. We're just talking about
9 maybe adding some incentive to get things going in this case
10 so that it can be decided and people can -- can get on with
11 their lives. And if someone wants to file a competing plan,
12 what's the bad thing in that? It -- it might be us; you know,
13 it might not be us. It might be someone else. It might be
14 current shareholders who are disaffected, maybe Mr. Petrofsky,
15 our -- our swell friend would like to file his own plan with
16 some of his friends on how to resolve this case.

17 And if -- and if Novell wanted to file a plan, what's wrong
18 with that, if indeed it did? Because that's what the Code
19 contemplates. It only -- it doesn't say terminate exclusivity
20 only if the bad guys don't want to file a plan. It says
21 terminate exclusivity unless you have cause to extend it. And
22 we heard today in argument and we saw in the papers that cause
23 was this notion that there are all these people out there just
24 waiting to do deals who only want to know when the appeal will
25 start.

1 Well, apart from its making no sense as an argument,
2 because as the Court has acknowledged I think today, even if
3 we knew that there was a final judgment and we knew what the
4 deadline for appeal was, we would have no idea on earth when
5 an appeal might be decided and what would be the outcome. And
6 we had no evidence on that point today, either. There is no
7 evidence in the record today that people are clamoring to know
8 when the appeal will start so that they can rush SCO with
9 their plans.

10 And, in fact, Your Honor, what we really heard today
11 was there's only one party out there. It's Stephen Norris
12 Capital Partners. And Stephen Norris Capital Partners has
13 known what the deal is at least since July 16th, if not
14 sooner, in terms of what the basic contours might be. In
15 fact, it was happy to file a plan before when it knew nothing
16 and knew much less about the outcome.

17 So, maybe they want to take their time and think
18 things through some more. Let them take their time and think
19 things through. Let them do that with -- in competition with
20 any other parties that want to do that. Otherwise, they'll
21 just keep taking their time, which is exactly what's happened
22 here and I think it's time to move.

23 This case is a year old! And as Counsel has
24 acknowledged, it's not a complex case, even though that's what
25 arg -- was argued in the opening papers. It's a simple case.

1 It's dependent on a major piece of litigation. That major
2 piece of litigation, as Mr. McBride has admitted today, is
3 decided. Everybody knows what the rights are, essentially.

4 We don't know what -- how an appeal is going to turn
5 out, but we might not know that for six years, or five years,
6 or two years. And it defies commons sense to think that a
7 sophisticated creditor is going to think that knowing when an
8 appeal starts somehow bookends the timing. And, of course, as
9 I pointed out, we have no evidence on that.

10 What we've heard Mr. McBride first sort of hint in
11 his testimony under direct that he'd be ready to file a plan
12 in November. But I think on cross-examination, Your Honor,
13 you heard him say something very different, which is, well,
14 you know, maybe, but maybe later on and maybe we'll have to
15 think about this and maybe we'll have to think about that.

16 And maybe that's all true. But the point is, let it
17 be true in the context that Congress envisioned in these kinds
18 of circumstances, the context in which the debtor has to think
19 about competing plans and what really should get done as
20 quickly as reasonably possible not -- there's nothing in the
21 Code which suggests that cause means extending a deadline for
22 exclusivity until the debtor has the perfect plan. But that's
23 essentially what this Court is hearing. And -- and that's not
24 what cause is.

25 We've heard in the pap -- we read in the papers

1 that -- and we -- we read in the papers several times that the
2 debtor has been diligently pursuing a restructuring of its
3 plan since before April 1st or April 2nd, whenever the debtor
4 actually appeared and withdrew its Stephen Norris plan. But
5 what we heard today was really not a heck of a lot's been
6 going on until at least the Court's ruling, the Utah Court's
7 ruling in July.

8 Now, there may be perfectly good reasons for all of
9 that, but that -- again, that doesn't mean that exclusivity
10 should be prolonged for as long as a debtor feels it's useful.
11 The debtor has quoted from his Court's comments at the prior
12 hearing. And I note that at the prior hearing the Court also
13 said, "It gets harder and harder to justify an extension."
14 We're now talking about a further extension and I don't know
15 really what we're being asked for today, because the debtor
16 has acknowledged, as I assumed it would, that it can't get an
17 opener -- open-end extension. So, what exactly kind of an
18 extension are we talking about here?

19 Well, I don't think there should be any extension.
20 Let's just go forward and if there's a competing plan, that's
21 not a bad thing. The assumption is that it's Novell's
22 competing plan if there's one to be filed. But it might not
23 be. It might be someone else's. It might be a good thing
24 that there's a competing plan out there.

25 There are times, and I've seen these and the Court's

1 seen these, I'm sure on both sides of the bench. They're not
2 all that common where you have competing plans. You can put
3 them on parallel tracks and people get to vote with their
4 pennies and their votes. And that's a good thing, frequently.
5 It's a little bit more expensive to do that, but sometimes it
6 produces the best result, just like an auction sometimes
7 produces the best result.

8 So, I ask the Court just to level the playing
9 field for all concerned here, not to -- not to ring out the
10 debtor, but let's terminate exclusivity now or, if not, very
11 shortly -- maybe what is it September? Maybe the end of
12 October, the beginning of the debtor's new fiscal year, let's
13 terminate it. And, if you did, I wouldn't be surprised if the
14 debtor managed to get a plan on file. And if the debtor
15 didn't get a plan on file by then, maybe noone would. Maybe
16 someone else would and that wouldn't necessarily be a bad
17 thing. Thank you, Your Honor.

18 THE COURT: Thank you, Mr. Lewis.

19 MR. SPECTOR: Short rebuttal, Your Honor?

20 THE COURT: Yes, Mr. Spector.

21 MR. SPECTOR: Continuing plans would scare the hell
22 out of potential investors. I just -- you can see it in any
23 case, especially in one as tenuous as the business model and
24 the litigation that's going on in this case.

25 How can Novell argue that the appeal is unimportant

1 while -- while trying so hard to keep us from the appeal? How
2 can they be coming into Court today as inconsistent as they
3 are everywhere else? If the resolution of the appeal were the
4 only important date, and they're saying, how important is it
5 to file an appeal? I mean, anybody's going to know it takes a
6 year to get to a resolution and maybe it'll be Supreme Court.
7 And maybe they'll be something else. But, Your Honor,
8 wouldn't have granted relief from the stay if the resolution
9 at trial was unimportant.

10 Your Honor said, "without a ruling on the liability
11 issues, Novell's rights in these bankruptcy cases remains
12 undetermined and the value of Novell's claim will remain a
13 troubling issue for the Court, Novell and debtors." That's on
14 page 10, Relief from Stay Opinion.

15 You went on to say, "The debtor simply cannot file a
16 confirmable plan of reorganization until they know what
17 liability they have to Novell." That's on page 11. And in
18 footnote 8 at the bottom of page 12, this Court said, "Until
19 the lawsuit can proceed to final judgment, the adverse ruling
20 is a sword of Damocles over debtors."

21 All right. Well, fine, why would Your Honor says
22 that if trial was unnecess -- what's a trial prove? Because
23 won't you have an appeal after that? And it will be another
24 year after that and maybe a Cert -- Cert of -- of -- grant a
25 Petition for Certiorari and that's another year. No, Your

1 Honor had his eye on the -- on the right ball. When we get
2 the trial done and we can get to the appeal, the world changes
3 for us in a large way.

4 Understanding without us even bringing in testimony
5 or -- or -- or motions to this, that it is an important
6 factor, getting the clock running is important. And -- and
7 they've stalled for a year, not without some merit. I mean,
8 there a Rule 54(b) motion. They opposed it. The Court ruled
9 on the merits and, you know, sometimes you win those,
10 sometimes you lose. But, now, they're trying to run out the
11 clock even more. They're opposing even the Court's ruling and
12 ordered them to provide a final judgment. They're fighting
13 that!

14 So, it's just -- it's just hypocritical to be
15 telling us why are we stalling? Stalling? If we're to be
16 faulted for anything, and we were and we will be again, it's
17 for jumping the gun, getting in here before we had all our
18 ducks in a row, coming in with the York deal, coming in with a
19 plan that wasn't finalized. We got roundly criticized for
20 that. That doesn't show we're trying to stall this case. It
21 shows maybe we're too exuberant in trying to get it -- or
22 aggressive trying to get it out quickly. We've been burned
23 once, even burned twice.

24 We promised Your Honor that we wouldn't come in
25 again with a half-baked or quarter-baked plan. We would make

1 sure that everything is there. We would do what Mr. Lewis
2 says we should have done the first time, make sure there's a
3 real commitment, that there's financing behind it, that it's
4 not just pie-in-the-sky, that people could walk away from in
5 the due diligence period and -- and that, Your Honor, is why
6 we need a further extension of exclusivity.

7 THE COURT: Mr. Lewis, --

8 MR. LEWIS: I'm sorry, Your Honor.

9 THE COURT: -- you may. No, no. Don't be sorry.
10 It's an important issue.

11 MR. LEWIS: Let me just address the last point
12 first.

13 THE COURT: Yes.

14 MR. LEWIS: I think we've just heard SCO admit that
15 it's two original deals, York and -- and SNCP plan were not
16 real deals. Well, if the debtor's wasted time by doing that,
17 it's its own fault, not our fault. We're not to be criticized
18 for asking the Court to make sure that whatever comes out next
19 time is a real deal. The debtor should have done that in the
20 first place. We spent a lot of money and the parties spent a
21 lot of time and this Court spent a lot of time on those first
22 two deals. They should never have been asked for if they
23 weren't real, if they didn't have real commitments.

24 Now, in terms of the reason on the appeal, first of
25 all, let's address the timing question again. And I want to

1 emphasize, no where this morning have I heard neither (sic) in
2 argument nor testimony that there's anything else the debtor
3 needs to know at the trial level about its substantive rights.
4 The only thing we've heard is the clock has to start running
5 and that, I submit to the Court, and the Court will have to
6 make its own assessment on this, but, first, the Court has no
7 evidence that that's true. And, secondly, it makes no sense
8 that it's true.

9 Because the clock's starting running doesn't mean
10 anything because we all know it could be two years or five
11 years or six years before this appeal is finally decided or it
12 could be one year or nine months. I don't know what the usual
13 route is in the Eighth Circuit. I know what it is in the
14 Ninth Circuit. And I certainly have some sense about what
15 it's like at the Supreme Court.

16 THE COURT: Certainly.

17 MR. LEWIS: So, it could be a very long time. And
18 even then, whatever happens, it might be remanded for further
19 proceedings. So, we might be back in the Trial Court! Who,
20 really sophisticated creditor, investor, white knight, would
21 be thinking, gee, the beginning of -- of -- of the time to
22 appeal is the magic time?

23 Now, in terms of stalling, Your Honor, I want to
24 reiterate we asked them the arbitration be allowed to go
25 forward. The debtor refused -- refused! The debtor isn't

1 saying it's not important. We haven't heard the debtor offer
2 to stipulate the judgment in the arbitration.

3 The debtor just wants to pick and choose which
4 things it wants this Court to endorse as a strategy in
5 which -- which it doesn't. That is using exclusivity for
6 strategic advantage. It's just as simple as that.

7 If the debtor thought that the Swiss arbitration
8 were unimportant, it would be offering to stipulate the
9 judgment in there. It hasn't done that. It just wants to
10 dismiss the action in sort of a do-over, King's X approach in
11 the Utah litigation because it wants to get on with its appeal
12 now.

13 But it could have allowed us to go ahead in Utah
14 last year -- in -- in Switzerland last year. And as I want to
15 emphasize, the cost was already pretty much put in. The
16 briefing was complete. You had essentially a one week trial
17 that had to be done and will have to be done someday because
18 it -- and I want to remind the Court, too, that the whole
19 reason we had these two trials is at the debtor's instance.
20 The debtor sued us in Utah. We counterclaimed. We began
21 the -- the proceeding in -- in Switzerland, but that's
22 because, as the record reflects, the debtor was bad-mouthing
23 our activities in -- in -- in Europe. We had to do something
24 to protect ourselves. It was really a defensive action, as it
25 was a declaratory relief action.

1 So, the notion that we're somehow stalling because
2 we want to have this litigation resolved completely, as was
3 originally contemplated, is -- is just not credible. What the
4 debtor's really saying is they're stalling because they don't
5 want to have it resolved on terms that are convenient to us.
6 That's not an equitable argument. That's a strategic
7 argument. It has nothing to do with the grounds for granting
8 an extension of exclusivity. Thank you, Your Honor.

9 THE COURT: Thank you, Mr. Lewis.

10 MR. SPECTOR: I was going to rise just to say one
11 word, "fini." However, a new issue just came in and I'm
12 really not pre -- the one to be addressing this SuSE
13 arbitration. SuSE is S-U-S-E for the record. We have Ted
14 Norman, who is from Boies, Schiller. We have Ryan Tibbitts,
15 both of those know a lot more about it. All they keep telling
16 me is the SuSE arbitration has nothing at all to do with
17 anything we're about here today. All I know about it is that
18 the -- Judge Kimball stayed certain our claims in Utah because
19 there's some underlying issues that the -- that the
20 arbitration in SuSE would assist the Trial Court in -- in
21 Utah, once that decision was made. Those two causes of action
22 that remain -- that were stayed, those are the ones we're
23 dismissing with prejudice. We're done with the Tenth Circuit.
24 We're ready to go.

25 I don't know anything about the SuSE balance of

1 that. Neither did Mr. McBride obviously about, you know,
2 what's going to there. If Your Honor wants a response that
3 makes sense about what's going on in the Switzerland
4 arbitration other than it's stayed, I would ask Your Honor to
5 ask either Mr. Tibbitts, the general counsel, or let Mr.
6 Norman explain what's going on there. Otherwise, if it is not
7 important, Your Honor, as I think it is not, then we'll just
8 rest with that.

9 MR. LEWIS: Your Honor, --

10 THE COURT: Mr. Lewis, you --

11 MR. LEWIS: -- I have a -- another way of -- of sort
12 of making Counsel's last point which is if the dismissal -- if
13 the claims that the debtor now says it's dismissing with
14 prejudice in Utah are -- are unrelated in essence to the
15 Utah -- to the Swiss arbitration and the Court's going to
16 grant final judgment, fine. Then we don't need to extend
17 exclusivity, because we'll have a final judgment in no time,
18 presumably. If it's not, and I leave that up to my co-
19 litigators to argue that with Judge Kimball, then we still
20 have the problem of the arbitration.

21 Either way, either there's going to be a judgment
22 soon, so you don't need to extend exclusivity. Or there's
23 going to be a problem with the SuSE -- with the Swiss
24 arbitration that's going to persist and the Court will have to
25 make a decision in the penalty of that, bearing in mind that

1 the persistence of the importance of the Swiss arbitration is
2 at the debtor's own behest. Thank you.

3 THE COURT: Well, allow me to say this because my
4 decision really is not going to turn either on the arbitration
5 or, for that matter, on the ability to initiate the appeal.
6 Because to some extent, in particular, the ability to initiate
7 the appeal, that becomes somewhat lost on me because there is
8 still tremendous uncertainty. Now, I don't know and here's
9 where it does become somewhat significant. I don't know what
10 is in the mind of potential investors. But what I do know is
11 that we are now before the Court or you're now -- the parties
12 are before the Court at a rather sensitive time in this case
13 and that is with the debtor about to head off to continue or
14 implement negotiations. In many respects, the litigation in
15 Utah led to two bad -- I'll call them bad -- unfortunate is a
16 better word, plans being proposed. And, if anything, those
17 two earlier plans highlight the significant impact that the
18 pendency of the Utah litigation had on this case. And
19 although for the statutory purposes, the time began running
20 upon the filing of the cases.

21 From a very practical standpoint, the time has
22 begun -- began ran -- began running when Judge Kimball issued
23 his decision in July. Because it was at that point that this
24 debtor and potential suitors knew what the parameters were,
25 what the reality was, what kind of a deal would make sense,

1 not only from the investor standpoint but, more importantly,
2 even from the debtor's standpoint.

3 And in exercising my discretion, I was taken -- and
4 I -- and I don't like to seize on words of counsel because to
5 some degree, you know, they're -- counsels speak and -- and --
6 and say a lot and I -- I don't like to necessarily just pick
7 on certain expressions. But, Novell's counsel used the word,
8 "let the chips fall where they may." And I don't think that
9 in a Bankruptcy case of this significance, chips just ought to
10 be falling where they may. I think there needs to be some
11 direction.

12 And to the extent that the Court would deny an
13 extension of exclusivity here, I am fearful that chips may --
14 may fall all over. And I don't think that that would be in
15 anyone's best interest, including Novell as a creditor of this
16 estate. And I think that this debtor ought to have the
17 opportunity with a successful result in hand from the Utah
18 litigation, to now go out and try to make a good deal which
19 it, frankly, was unable to make at an earlier time when that
20 Utah litigation was, as I said earlier, a sword of Damocles
21 hanging over its head.

22 And it was clear from those earlier deals that at
23 that point in time, the debtor was acting in desperation. And
24 I have grea -- much greater confidence that the debtor will
25 now be acting with a position of strength in the negotiations

1 and that is going to be useful for everyone.

2 And I am taken by the case law and the factors which
3 the cases discuss and I don't know that I need necessarily to
4 run through all of them and I don't have to find that all of
5 them exist here. But the fact is that this case has been
6 complex because that was a complex piece of litigation that
7 Judge Kimball presided over and very capably.

8 And there is -- I -- I don't think there's been
9 sufficient time given the pendency of that litigation to ne --
10 negotiate properly. That is now -- that is now upon us. I
11 think that the debtor has shown every reasonable evidence of
12 good faith progress in -- in the negotiations it is
13 undertaking for a deal. The debtor is paying its debts as
14 they're coming due. I have a sense of reasonable prospects
15 right now that I didn't have six months ago; noone had six
16 months ago.

17 And the case really, although, a year is not a
18 short time, that the case has been pending, under these
19 circumstances, I said where that litigation was really a
20 tremendous burden for the debtor, it has not been a long
21 time.

22 So, with all of that in mind, I do think that it is
23 appropriate here for the Court to exercise its discretion to
24 extend the exclusivity. I'm trying to find some help with a
25 reasonable extension of time that is not so short that now we

1 have the debtor operating in its negotiations, if you will,
2 with the Court on its tail.

3 So, I do want to allow, I think, and appropriately
4 so, some leeway. And what I would propose is to extend the
5 exclusivity, to extend it to the end of the year with the
6 understanding, obviously, that if the debtor arrives at a --
7 at a useful solution and -- and a plan to propose that it
8 could obviously do so sooner, doesn't have to wait until the
9 end of the year, but that at least that will enable the debtor
10 to operate with some degree of flexibility.

11 And, -- and I do appreciate -- I do appreciate
12 Novell's points. But I think that I've been looking at this
13 from a slightly different angle than even the debtor was
14 looking at and, namely, not placing quite such great weight
15 upon the entry of the final judgment, but rather an
16 opportunity to -- to find some -- some solution in
17 negotiations which are now at hand. So, that is the Court's
18 ruling. And I would be pleased to either interlineate an
19 order or --

20 MR. SPECTOR: I will -- I will have one uploaded.
21 Do you do it here uploading, or do you want to have Counsel
22 deliver one?

23 THE COURT: Counsel can deliver one; that's fine.

24 MR. SPECTOR: This one would be marked up too badly.

25 So, --

1 THE COURT: Okay. All right. Then why you do that,
2 if that's all right, Ms. Makowski will get it over here, I
3 know. And --

4 MR. SPECTOR: I'll run it by you, if you want.

5 THE COURT: And you'll run it by -- yes, please.
6 Run it by counsel for Novell.

7 MR. SPECTOR: Yes, sir.

8 THE COURT: And for the U.S. Trustee for that
9 matter, --

10 MR. SPECTOR: Of course.

11 THE COURT: -- if you would.

12 MR. SPECTOR: Of course.

13 THE COURT: And, obviously, extension -- the -- the
14 exclusivity extends pending my entry of that order.

15 MR. SPECTOR: Sixty days after the 31st of December
16 is something like February 28th, but it may be March 1st,
17 because it's short.

18 THE COURT: The hundred? I'm not sure about the
19 number of days either.

20 MR. SPECTOR: Right. I'll -- I'll figure that out.
21 I'll do that.

22 MS. MAKOWSKI: Right.

23 THE COURT: Counsel, I thank --

24 MR. SPECTOR: Thank you.

25 THE COURT: -- you. Anything further?

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MR. SPECTOR: No, Your Honor.

MR. LEWIS: No, Your Honor.

MR. SPECTOR: I appreciate your time and -- and I apologize for the folks that had to be bumped.

THE COURT: Well, I have a feeling they were -- they were looking forward to the additional time, knowing that case.

MR. SPECTOR: Right!

THE COURT: But, in the meantime, we will stand in recess, --

MR. SPECTOR: Thank you.

THE COURT: -- and I thank Counsel --

MR. LEWIS: We're always glad to be of --

THE COURT: -- for a very excellent argument.

MR. LEWIS: -- service, Your Honor.

THE COURT: Thank you. Good day now.

MS. MAKOWSKI: Thank you, Your Honor.

MR. SPECTOR: Thank you.

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C E R T I F I C A T I O N

I, Lisa A. Wilson, court approved transcribers,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

September 26, 2008

LISA A. WILSON